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A REVIEW

OF THE

ARGUMENT OF PRESIDENT LINCOLN

AND

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ATTORNEY GENERAL BATES,

IN FAVOR OF PRESIDENTIAL POWER TO SUSPEND THE PRIVILEGE OF THE

WRIT OF HABEAS CORPUS.

BY



S. S. NICHOLAS, of LOUISVILLE, KY.

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ARGUMENT OF PRESIDENT

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ATTORNEY GENERAL BATES

WRIT OF HABEAS CORPUS



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LOUISVILLE, KY.

PRINTED BY GEORGE A. GIBSON, COR. FIRST AND MARKET STS.

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A REVIEW, &c.

"We are in the midst of strong agitations, and are surrounded by dangers to our institutions and government. The imprisoned winds are let loose. The East, the West, the North, and the stormy South, all combine to throw the whole ocean into commotion, to toss its billows to the skies, and disclose its profoundest depths. I speak for the preservation of the Union. I speak out of a solicitous and anxious heart, for the restoration to the country of that quiet and harmony which make the blessings of this Union so rich and so dear to us all. If I can do anything, however little, for the promotion of this end, I shall have accomplished all that I expect."—WEBSTER.

It may be necessary, with those to whom the writer is not personally known, to premise, that he claims to be a thorough and devoted Unionist. He has manifested his right to make that claim by having, during the last five years, written and published more, probably, than any other man, to arouse the nation to a perception of the proximate danger to the Union from the treasonable machinations of secessionists and abolitionists. For all that time he has been constantly predicting the present state of national affairs. He has assiduously assaulted the secession heresy with argument and denunciation. He has done what he could to portray the inestimable value of the Union, and the endless, numberless evils of its dissolution. Could there be such a thing as a dictatorship, he should deem its power rightly employed in decimating leading secessionists and abolitionists, in decimating the members of secession conventions, and especially in decimating the secession members of the Virginia Convention, the Tennessee and Missouri Legislatures, who so signally betrayed popular trust.

He believes the present civil war will be long protracted; that we are marching with rapid strides to that military despotism predicted for us by the fathers of the Republic; that the preservation of the Constitution, with those principles of civil liberty which it consecrates and secures, is the very highest obligation of patriotism, far above the mere preservation of the Union; that the entire destruction of the Constitution and civil liberty is a price the nation cannot afford to pay for preserving the Union, even if it were not absurd to suppose that the preservation of the one requires the destruction of the other; that it is a gross calumny on the structure of our government, to charge that it is too weak to put down the present rebellion; and that if it cannot be put down with an army of five hundred thousand men, and a large navy, without trampling on the Constitution, it will be because of the incompetency of the President and his cabinet, and not from any fault in the structure of the government. With these views, the writer means perseveringly to use his very humble efforts to stay the march to despotism, and earnestly entreats the co-operation of the thousands of far abler and younger men scattered through the country. The opinions, as to principles now to be vindicated, were all matured and published near twenty years ago.

President Lincoln, in his message, avows that he has "authorized the Commanding General, in proper cases, according to his discretion, to suspend the writ of *habeas corpus*; or, in other words, to arrest and detain, without resort to the ordinary process and forms of law, such individuals as he might deem dangerous to the public safety."

After a very brief discussion of his power to do this, he excuses the not

giving a more extended argument, because one from the Attorney-General will be presented to Congress. He thus adopts the latter, and makes it his own. It is, no doubt, the result of full consultation between them, and also with the Cabinet. The President is, to all intents, as fully responsible for the argument as the Attorney-General himself. The matter will be so treated.

The argument endeavors to prove the President's power so to suspend the privilege of the writ, so to order such arrests, and that in so doing he is not controllable by the Judiciary; and perhaps, also, its true meaning is, that he is not controllable by Congress either. In other words, it seems to be contended, that in the exercise of his executive functions, for the suppression of rebellion, at least, if not for all other purposes, he acts by his own arbitrary discretion, free from the control of Congress and the Judiciary—either, or both. The pretension to this power is not confined, either by argument or the President's acts, to such States or districts as may have been proclaimed to be in insurrection; but the power operates all over the Union, and may be applied equally to a citizen of and in Maine, as to an inhabitant of a proclaimed State.

This is a high pretension, now for the first time asserted in behalf of a President. In the existing state of things, and in view of what has already been done, it is a pretension of the most momentous importance. It places the personal liberty of every man in this nation within his arbitrary discretion. He may arrest any one, without justifiable cause, transport him where he pleases, incarcerate him during the continuance of this war of probably many years' duration, subjecting him during the while to such deprivation, hardship, and humiliation, as the President may think proper to inflict. For all this the citizen is to have no redress. Against such atrocious, tyrannical outrage the law of his country can afford him no redress.

Such startling innovation upon what has heretofore been considered the well-settled principles of our government, such thorough destruction of the most cherished right of freemen, the nation will naturally expect the President and Attorney to sustain by some show of precedent, some judicial decision, or at least the opinion of some lawyer or statesman. But, reasonable as such expectation is, it has not been complied with. They adduce no authority—none whatever in their behalf—not a single precedent, decision, or opinion. The few cases they do cite, having not the slightest bearing in their favor, their citation only serves to prove, that, after careful search, no semblance of an authority can be found. (For a synopsis of the cited cases, see Appendix D.)

A reference to the synopsis will show that they stand exposed, for impudently attempting the most daring usurpation of tyrannical power, and a most pernicious innovation on the structure of the government, without a precedent or an authority to sustain them. Their claim rests exclusively upon their reasoning, which will be found as little reliable as their pretended authorities.

These tremendous powers are vindicated by various propositions—some merely assumed, while others are attempted to be proved. They will be considered in the following order:

1. *The ex-officio power to arrest.*
2. *The exemption from control.*
3. *The constitutional prohibitions.*

The argument, by way of introduction, gives the following fair view of the fundamental structure of the Government, which is most cheerfully adopted as a starting point for this review. Every lawyer will concur, and would use similar language, in any argument for keeping the President within constitutional limits. How it subverts an argument, whose main purpose is to free him from all restraint, is not so obvious.

"In England it has grown into an axiom, that the Parliament is omnipotent. For all the ends of government the Parliament is the nation. But, in this country, it has been carefully provided otherwise. * * * In breaking

the ties with the British empire, complaints were leveled chiefly at the *King*, not the *Parliament*, nor the people. In the formation of our national government, our fathers seem to have been actuated by special dread of the unity of power, and, in framing the Constitution, they preferred taking the risk of leaving some good undone for lack of power in the agent, rather than arm any governmental officer with such powers for evil as are implied in the dictatorial charge, to "see that no damage comes to the Commonwealth."

"Hence they adopted the plan of checks and balances, forming separate departments of government, giving each department separate and limited powers.

"Our government, indeed, as a whole, is not vested with sovereignty, and does not possess all the powers of the nation. It has no powers but such as are granted by the Constitution, and many powers are expressly withheld. The nation is equal with all other nations, having equal powers, but it has not chosen to delegate all its powers to this government, in any or all its departments."

That is, it has not delegated all its legislative or judicial power; and, having "a special dread of the unity of power," it has been very careful not to delegate all its executive power to any single functionary.

1. THE EX-OFFICIO POWER OF ARREST.

Each department being confined to "granted and limited" powers, according to this full concession, the obvious first duty of Messrs. Lincoln and Bates was to show a grant of the power of arrest to the President, and how it is limited. An unlimited grant would not fulfill the terms of the concession. But this they do not do, nor pretend to do. They show neither a limited, or unlimited grant of such power: neither can it be done. There is not a word in the Constitution to that effect.

In England the power is a prerogative of the Crown. But we have no prerogative powers in this country. In England even, it is an exceptional power of infrequent use, the power in practice being almost always confined to the Judiciary. Our ideas of government, being so essentially derived from the principles and practice of that of England, the framers of the Constitution must have viewed the power of arrest as properly a judicial and not an executive function, and that consequently the whole power would go to the judiciary, in the absence of any express declaration to the contrary. Not being properly an executive power, they knew that it would not pass under any general grant of executive power; and if it had been desired or intended that the President should participate in its exercise, they would have been very careful to say so, and point out distinctly how far he should participate. This not being done, there is not even the semblance of a fair pretext for his participation to any extent whatever.

The uniform usage of our governments, both Federal and State, has been in strict conformity with this view. We know that Mr. Lincoln is the first President who ever attempted the exercise of such a power. It is confidently believed that no instance can be adduced of any such attempt by the Governor of any State, unless specially and explicitly so authorized by law. It is also believed that there has not been an instance of such attempt, with or without law, for it is so contrary to all our American ideas of proper government, that it is not credible any State convention or legislature should have been foolish enough to confer such power on a Governor.

This is a high pretension, now for the first time asserted in behalf of the President. The attempted innovation should be well fortified with precedent or analogy. Neither is adduced. We are not even furnished with an attempted argument in its behalf. It rests entirely upon bold, impudent assumption.

It is true, that, after General Wilkinson, under circumstances of supposed State necessity of great urgency, had made arbitrary arrests of suspected

accomplices of Burr, President Jefferson approved his act, not by reason of its legality, but in despite its admitted illegality. The Supreme Court condemned the arrests as illegal, notwithstanding the presidential ratification, and Congress persistently refused to indemnify Wilkinson for the damages to which he was made liable, at the suit of the persons arrested.

The bill, which, about that time, at the instance of Jefferson, passed the Senate, for suspending the writ of *habeas corpus*, and which was indignantly rejected by the House of Representatives, contained express grant of power to the President to make arrests. This bill was, no doubt, drafted under advisement with Jefferson and his cabinet, and is full proof that neither they nor the Senate thought the President, *ex-officio*, possessed any such power, or that he would possess it after the suspension of the writ, without an express congressional grant.

It is true, also, that General Jackson made sundry arbitrary arrests at New Orleans, under his pretended martial law. But he had been told in advance by two most distinguished lawyers—Edward Livingston and Abner L. Duncan—who were his friends, and acted as his aids, that he had no power to declare martial law. An intelligent court martial, of his own selection, decided his martial law to be a mere nullity, and gave him no power over citizens not attached to the army or militia. The District Court (U. S.) afterwards decided in the same way—as did also a very able Appellate Court, of Louisiana, after full investigation and enlightened discussion.

It is true, Congress, some twenty years afterwards, refunded the fine imposed upon him by the District Court, but, in so doing, special care was taken not to use one word, either in the preamble or body of the act, in justification of his martial law, or in censure of the judge who imposed the fine. On the contrary, a committee of the Senate, of which Mr. Berrian was chairman, and another of the House, of which the present Senator Pearce, from Maryland, was chairman, each made a report denouncing martial law as wholly inadmissible in "this free Republic."

It is not contended that a military commander may not make prisoners of rebels found resisting, with arms in their hands, and all others proximately present, aiding and assisting without arms, or found in illegal gathering, to aid rebellion. Warfare against rebellion may, no doubt, be carried on according to the civilized usages of war among hostile nations, and among the incidents thereto, is the making and detaining of prisoners, to be handed over to the civil authorities for trial and punishment. But the arrest of citizens not engaged in hostilities is a different thing, and must be left to the civil authorities by due process of law. The one is a thing of absolute, unavoidable necessity, fulfilling the very purpose for which the military is called in aid of the civil authority, and is in accordance with usage and precedent, whereas the other is not a matter of absolute necessity, is contrary to usage and precedent, and should be left to the adequate judicial corps appointed by law for that purpose. If this corps is not sufficiently numerous to answer the need of such an occasion as the present, the proper remedy is by a temporary increase of its members.

The true theory of the whole matter—the constitutional theory—is, that a President, in putting down a rebellion, performs little, if anything, more than the functions of a sheriff at the head of a *posse comitatus*. The army and navy, when so employed, are, in legal sense, only a larger and more powerful sort of posse. This was the view taken by the Government of Massachusetts during Shay's rebellion, and by Washington during the Pennsylvania insurrection. Washington told his army "they should not consider themselves as judges or executioners of the laws, but as employed to support the proper authorities in the execution of them." In other words, that he and his army were merely acting in aid of the proper officers of the law. Lord Hardwick said: "The military act on occasions of resistance to law—not *qua* military, but simply in aid of and in obedience to the civil power, which calls them in."

2. THE EXEMPTION FROM CONTROL.

Let the power of arrest be conceded to the President, still the power in his hands, as in that of any other officer, must, according to theory and uniform practice, be subject to the supervision and control of the judiciary. It is so in England. Neither the Crown, nor either House of Parliament, enjoys any exemption. The world has never known a prouder political body, nor one more jealously vigilant in the preservation of its power and prerogative than the House of Commons; yet, it has been compelled, like the Crown and the House of Lords, willingly or unwillingly, to submit to the supervision and control of its arrests and imprisonments. The same is true in this country, as to both Houses of Congress, as has been exemplified in various instances. Indeed, if both Houses, with the approval of the President, should so far forget themselves as to unanimously order the arbitrary arrest and imprisonment of the humblest citizen, no lawyer doubts the competency of the judiciary to inquire into the legality of the imprisonment, and discharge the prisoner.

From the beginning, our Federal and State Judiciary have exercised the power of deciding upon the constitutionality of the acts of all officials. This has been done not merely with the uniform acquiescence of all the departments of both sets of government, but with the cordial, unanimous approval of the whole nation. It has become the ingrained opinion, the heart-cherished belief of every American, as it is of every enlightened Englishman, that the judiciary are the conservators of his dearest personal rights as a freeman. His belief especially is, that so long as we have an honest, independent judiciary, he will be exempt from the despotic, tyrannical power of arbitrary arrest and imprisonment—at least, until the legislature, in its wisdom, shall temporarily suspend the writ of *habeas corpus*. His belief is, that whenever the legislature does that, and confers upon the executive the power of civil arrest, it will accompany the grant with such safeguards and limitations as not unnecessarily to trench upon the liberty of worthy citizens, and not leave them farther than cannot be avoided, to the arbitrary caprice and malice of the President and his subordinates.

But now we are told that we have to unlearn all this; that we have one functionary in this free Republic, who is above control, who is not to be controlled by a law which controls Kings, Lords, and Commons in England, Congresses and Legislatures in America; that our President Lincoln is far above such control; that it would be derogatory to his executive independence to submit to such control. "Upon what meat does this our magnificent Cæsar feed, that he is grown so great, so got the start of the majestic world?" (Appendix B.)

If the President, when acting in conjunction with Congress, is under judicial control as to the constitutionality of his acts, surely every principle of analogy and policy require, he should also be under such control when acting separately upon his mere discretion and authority. If not, then there is something in the Constitution which gives him that exemption. Where is that clause, phrase, or word? Messrs. Lincoln and Bates say, it is to be found in the clause—"The Executive power shall be vested in a President." It does not say free from control, any more than it says the legislative power vested in Congress shall be controlled. If the convention had contemplated vesting uncontrollable power, in either of the two departments, it would have rather been in that highest of all the departments, which was to wield the great legislative power, as the representatives of the people and the States, composed, too, of such numbers as to propitiate popular confidence, rather than that other department to be filled by a single individual, and of whose powers, according to the admission of Messrs. Lincoln and Bates, the framers of the Constitution had such a "special dread."

"The executive power shall be vested," &c. What power? Not all the executive power of the nation—this they themselves admit was not intended,

It meant such as was granted in the Constitution, or which might be created by law. Because it was impracticable to specify or enumerate all executive powers, because most of them would depend upon the creation, regulation, and consequent control of Congress—their specification or enumeration was not attempted—and not because of any special trust or confidence in the officer. Where is the law granting this power of arbitrary arrest? There is none such; there can be none such, for it would be a plain violation of the Constitution. Unless, indeed, they can make good their bold, novel position, that the power is a necessary indispensable incident to executive power, of which the President cannot be deprived, and in whose exercise he cannot be controlled by Congress or the Judiciary.

It is very doubtful whether the President has any incidental or inferential power, properly so called. Or, in other words, whether all his powers must not come by express grant. So it was held by Calhoun, and other Senators, in the great debate on Jackson's Protest. (See Appendix A.) Indeed this seems fully admitted by Messrs. Lincoln and Bates in that part of their argument where they say: "Our government as a whole, even, is not vested with sovereignty, and does not possess all the powers of the nation. It has no powers but such as are granted by the Constitution. The nation has not chosen to delegate all its powers to this government, in any or all its branches." When, therefore, a power is claimed for either department, a specific grant must be shown. The implied or constructive powers are amply and well provided for by the final clause of the section granting powers to Congress: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or any department or officer thereof." There is no such clause as to the Judiciary or Executive: neither of them is vested with all such other power as may be necessary or proper for carrying into execution the powers granted to them. As to all auxiliary powers, they must wait for, and are wholly dependent upon, the action of Congress. There is scarce a conceivable thing, beyond a call of Congress and the reception of Ambassadors, that the President can do without the previous sanction of Congress. The clauses, saying—"The Executive power shall be vested in a President, and the Judicial power in one Supreme Court," &c., mean that beyond the express grants contained in the Constitution, whenever Congress requires an executive or judicial function to be performed, the power therefor shall be conferred by Congress on those departments respectively. Such has been the uniform construction and practice. Messrs. Lincoln and Bates claim that the President can, at his mere discretion, arrest any man or woman in the nation, and transport him or her to a remote quarter to be kept in secret incarceration during the rebellion, though it should last many long years. This, too, he has actually done by many secret arrests in unproclaimed States. In place of the open, direct, manly, day-light proceeding of England and America, he is instituting the *lettres de cachet* and Bastiles of France, with the secret, midnight searches and seizures of the Spanish Inquisition. This power they claim for him, because, they say, he is the sole, controllable judge of the manner in which he shall exercise his power in putting down rebellion. That is, because he has the army, the navy, and the militia under his control, he may use the power they afford to make the arrests and imprisonment, that being, in his opinion, a proper aid towards suppressing the rebellion. If the unarmed private citizens he chooses to suspect, and arrest, become too numerous and expensive to keep, without too great a burthen upon the treasury, why may he not cut their throats? Why may he not take one man's property and give it to another? Why not raise money through forced loans? Why not destroy or confiscate the property of the suspected? These, in his opinion, would all be most efficient aids in suppressing the rebellion. The army and the navy furnish him ample power to use such aids. Ay, but, they will say, he is too good a man so to abuse his discretion. But does not the enormities

which may be committed under the power they claim, prove that he can have no such power?

It could never have been the intention to entrust such discretion to any man. It is contrary to all analogy to derive such power by implication. His plan may be a very efficient one; the Constitution and Congress may be very unwise in not authorizing him to pursue that plan, but its excellence affords no reason for his usurping the right to pursue it. From the fact of having the physical power under his command, to enforce the plan, he cannot infer a right so to use that power. He had as well contend, that because God has given him the physical power to murder, therefore he is at liberty to commit murder.

The argument is, that it is the "plain, peculiar duty of the President to put down rebellion." They speak of it as an *ex-officio* duty in the performance of which he has a right to employ, at his discretion, any power under his control. The army and navy were always under his control. Then why was it necessary, by the act of 1807, specially to authorize him to use them in putting down rebellion? The truth is, he could not even aid in putting down rebellion, by reason merely of any *ex-officio* power. Hence the acts of Congress expressly giving him the power. So far from its being his "plain, peculiar duty to put down rebellion," the duty is peculiar, if to any one, to Congress, with whom the power rests, and from whom the President's duty and power in the matter altogether proceeds.

The argument says: "The insurrection is purely political. Its object is to destroy the political government of this nation, and to establish another political government upon its ruins. The President is eminently and *exclusively* political in all his principal functions. As the political chief of the nation, the Constitution *charges him with its preservation, protection, and defense*. In that character he arrests and holds in custody those whom, in the exercise of his political discretion, he believes to be friends of, and accomplices in, the armed insurrection. He has no judicial powers. The judicial department has no political powers, and therefore no court or judge can take cognizance of the political acts of the President, or undertake to revise or reverse his political decision.

In another part of the argument it is said: "All the other officers are required to swear only "to support this constitution," while the President must swear "to preserve, protect, and defend it," which *implies the power to perform* what he is required in so solemn a manner to undertake. Then follows the broad, compendious injunction, to "take care that the laws be faithfully executed." This injunction, embracing as it does, all the laws, Constitution, treaties, statutes, is addressed to the President alone, and not to any other department or officer. This constitutes him in a peculiar manner, and above all other officers, *the guardian of the Constitution*—its preserver, protector, and defender."

This is not the first time that a great to-do has been made by a President, over the difference between the form of his official oath, and that of other officers, though there is in fact no substantial difference between them, the oath to support the Constitution being every way equivalent to one to preserve, protect, and defend it; for it cannot be properly supported unless it is preserved, protected, and defended. The difference was not intended to indicate, nor was it made because of any special trust in the President as a safe guardian, but from an opposite reason. It was because of that "special dread" which was felt, as admitted, of Presidential power, that an apparently somewhat more stringent oath was prescribed for him than for the other officers. It was merely intended to make his promise more emphatic. The nation must have partaken very little of the views of the Convention, if the latter really looked to him as the peculiar guardian of the Constitution, for nothing can be better known, than that from the very commencement the nation looked upon the Judiciary as its peculiar guardian, and has so regarded them ever since.

The first attempt to use the oath in this way was made by Jackson, in his famous Protest, to screen himself from censure for his abuse of power in the removal of the deposits. The language used gave some plausibility to the idea, that he was attempting to derive power from the words of the oath, and it was so charged, until his leading friends in the Senate disclaimed for him any such intention. Before the disclaimer came, Clay spoke of the imputed attempt as follows :

"The President begins and ends the protest with a resort to his official oath as a source of power, which no man before ever regarded as granting power. What is the oath? He is '*to preserve, protect, and defend the Constitution.*' Taken in their largest, most extensive sense, and regarding the oath as a grant of power, these expressions may be interpreted to create a right and duty, on the part of the President, to preserve and protect the Constitution, as he understands it, against all violations by whomsoever attempted. If the Supreme Court, State Legislatures, or Governors, or even Congress, should expound the Constitution contrary to his sense of its meaning, he may employ all the means at his command, military and civil, to prevent the threatened violation. The consequence would be, that we should have but one expounder of the Constitution in the whole Government, and but one will controlling all its operations. Never before did any man regard the official oath as containing a grant of power."

Now we have two men, Messrs. Lincoln and Bates, who do not cause it to be merely suspected, that they are claiming power by virtue of the oath, but boldly, unblushingly, undisguisedly claim the oath as a grant of enormous, o'ermastering power. They say, "the President must swear to *preserve, protect, and defend the Constitution, which implies the power to perform what he is required in so solemn a manner to undertake.*" Thus, what the intelligent friends of Jackson in the Senate were compelled to shrink from and disavow as an indefensible folly, these gentlemen have the effrontery distinctly to claim as the grant of power so limitless in extent as to afford ample foundation for that military dictatorship which, it is suspected, they and others desire to establish over the nation. Dictatorship over Congress, and all the office-seeking part of the nation, his five hundred million patronage has already given him; we have yet to see whether his army of five hundred thousand men will give it to him over the balance of the nation. The issue is, at least, doubtful. Whilst it remains so, all true men should struggle while they may, to retard, to prevent the rapid march to an unmitigated tyranny.

Messrs. Lincoln and Bates are men of far too much intelligence not to know that to claim the oath as a grant of power is the merest absurdity. When such men resort to such means to gull the million, as to usurpations, they render themselves obnoxious to the strongest suspicion. No past reputation for integrity gives any exemption to such suspicion. The possession of great power is new to Mr. Lincoln. Its intoxicating influence is proverbial. He has given no evidence of any desire to resist that influence, but in everything betrays that easy virtue which promptly yields without resistance. His past reputation for integrity, so far from shielding him from suspicion, becomes itself suspected. The well-earned reputation, for political integrity, of a Washington and a Madison all combined in a single President, would not, under such circumstances, shelter him from suspicion. What has this new, untried man, the President of a minority, the mere head of a sectional party, largely fanatical, to shield him? The nation must look carefully, heedfully to this matter. With a President wielding five hundred million of patronage, controlling five hundred thousand armed men, and claiming and using such enormous, unrestrained power, every patriot should be on the alert.

They further tell us: "The insurrection is purely political." What stuff is this? Is not every rebellion equally political? It may do so to characterize it in common parlance to distinguish it from a religious rebellion or a whisky

rebellion. But, in a legal sense, there is no such distinction, they, equally with this, being a revolt against the political power of the government, and equally requiring that power to put them down.

"This insurrection is purely political. Its object is to destroy the political government of the nation." Is not the object and effect equally to destroy the judicial and every other non-political part of the government?

"The President, as the political chief of the nation, arrests and holds in custody those who, in the exercise of his *political discretion*, he *believes* to be *friends* of, and accomplices in, the armed insurrection." Not those against whom there is proof to cause belief, but those whom the President chooses to believe, without proof, are accomplices. Are we to imitate the base acts of the French revolution, when men were imprisoned, if not beheaded, because they were suspected of being suspicious.

"The judicial department has no political powers, and therefore no court or judge can take cognizance of the *political* acts of the President." This, too, though they say "he is exclusively political in all his principal functions." That is, in the discharge of all his ramified duties and manifold powers, the legality of his acts are subject to no judicial test or investigation. His *sic volo*, *sic jubeo*, are to stand in lieu of law. If this does not startle up the nation, wide awake, what will? His dispersing the members of the two Houses of Congress by the bayonets of his armed myrmidons ought not to have any greater effect—indeed, not so much. By the power of patronage he holds the majority of Congress, already, in submissive obedience. They are an aid, rather than a hindrance, to any usurpation he may choose to make. The liberties, the property, not to say the lives of every man and woman of this great nation rest on his discretion; they can be taken away at his arbitrary will; they are only enjoyed by his permission. With a submissive Congress, and an impotent judiciary, what are any man's rights worth? what guarantee has he for them? This is no attempt at fictitious alarm, at an improbable, non-presumable state of things. It already exists. Men have been taken from their beds at the dead hour of night, secretly incarcerated in remote States, and their friends cannot learn even the alleged cause of arrest. These arrests, too, made in States against which there is no proclamation of rebellion, and none properly can be made. When commanded by the nation to produce a prisoner before the Chief Justice and show cause of his detention, he denies the power of the nation, or which is the same, the power of the law to send such a command. He authorizes his military subordinates to proclaim and enforce martial law over the people of States not proclaimed to be in rebellion. That is, he authorizes those subordinates to substitute their will in place of law, and to govern those people by their arbitrary will. He directs or permits those subordinates to not merely violate the freedom of the press, but actually to suppress entirely the publication of newspapers. These are some only of the initiatory steps—what is to follow no man can tell.

In arresting and imprisoning he exercises political power, it is said, and therefore no court or judge can take cognizance of his acts. The House of Representatives has none but political powers, yet when it imprisons a citizen it has to submit to a judicial order for his enfranchisement. If anything can properly be called purely political power, it is the legislative power of Congress. Yet if, by unanimous vote, with the President's approval, Congress passes an act to arbitrarily imprison or otherwise punish a citizen, the Judiciary can take cognizance, is bound to take cognizance, and release the prisoner in despite of all the dignity and power of Congress. This not only every lawyer, but every tolerably informed citizen well knows. There is, therefore, no myth or virtue in a political power, merely because it is political, to deprive a citizen of his constitutional right to be protected against its unlawful exercise to his injury.

There are a certain class of executive powers, such as appointing to office, which are purely discretionary, which judges and books of high authority, for the sake of classification, denominate, rather inaccurately, political

powers. For though all such power may be political, yet all political power is not purely discretionary. The distinction therefore is properly between powers *purely discretionary*, as the appointing, the veto, and the treaty-making power, and those which are not. The former are not, whilst the latter are, subject to judicial control without reference to the fact whether the power be political or otherwise. There is another rule, which, though it may not cover the whole ground, is sound and safe as far as it goes. That is, all ministerial, executive acts, so far as they trench upon individual right, are subject to judicial control.

According to the theory of our government, every right must have a remedy for its enforcement, and every wrong a redress.

As said by the Supreme Court in *Marbury vs. Madison*, 1 Cranch, 162: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the King himself is sued in the respectful form of petition, and he never fails to perform the judgment of the Court."

"The Government of the United States has been emphatically termed a Government of law, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a legal right."

"Is it to be contended that heads of departments are not answerable to the laws of their country?" * * "What is there in the exalted station of the officer which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to his claim? If one of the heads of department commits an illegal act, under color of his office, by which an individual sustains injury, it cannot be pretended that his office alone exempts him from being sued or compelled to obey the judgment of the law."

Hence the inference, that while the President is merely passive, only failing to exercise an executive power whose exercise rests in his discretion, or exercises it without injury to private right, the court can take no cognizance; but when the power is brought into action, and an individual thereby illegally sustains injury, the courts may give him redress, though the President himself commanded the act to be done. Thus the acts of the President and his subordinates, in the management of soldiers, though a power accompanied with much discretion as to the mode of exercise, yet being ministerial, if unlawfully used to the injury of a citizen, the courts can give him redress. So where the President, in the exercise of his discretion, as to the mode of managing the military force in putting down a rebellion, chooses to use part of it in the illegal arrest and imprisonment of a citizen, the courts must give relief. This, too, though (as surmised by Messrs. Lincoln and Bates) the President should sink the dignity of his office so low, as himself personally to become the catch-pole and jailor.

As said by Blackstone, "the law is no respecter of persons; but in England, for fundamental reasons of State policy, this is taken in subjection to the maxim that the king can do no wrong and no mandate can be directed personally to him. We have no such maxim or legal reason why a judicial mandate should not go against him as well as any other officer. But from reasons of comity to a co-ordinate department, and of respect for the exalted station, the courts will refrain from sending such mandate as long and as far as duty will permit. That his station gives him legal exemption from judicial coercion is an idle pretense. No one knows better than Messrs. Lincoln and Bates, that he can be sued for debt and made to pay it; that he can be sued for an article of personal property and made to deliver it up from his very clutch in his own palace; that if the law of the District of Columbia allows imprisonment for debt, he may, under a judgment of the Federal Court there, be incarcerated for its non-payment, with no legal power in the land to release him without payment; and further, that in a State Court he can be tried for any crime, and even hung for murder. How perfectly preposterous, then, the

pretension, that the legality of an arrest or imprisonment by one of his subordinates, shall not be judicially inquired into because done by his order.

This is a most magnificent President we have. He not only denies to the Judiciary all control over his official acts, but denies it to Congress also. This, too, though nearly all the executive power he has—much the major part at least—he derives through Congress, who could repeal it away from him tomorrow. Nor is this all. He claims that he is responsible for his official conduct to the Court of Impeachment alone; yet, when called upon by the grand inquest, the House of Representatives, which has the sole power of impeachment, to say why he arrested and imprisons certain citizens, he refuses to answer. He refuses to answer at the nation's command, given through its writ of *habeas corpus*, and refuses to answer at the request of the nation's representatives, or at least those who call themselves such. Verily, if the nation only had real representatives, he would soon be shorn of his lofty pretensions, his vaulting ambition controlled, and he made to know that *no man in this country is above the law*. (See Webster's strictures on the one-man power, Appendix C; and also what Kent and other judges, of the Supreme Court of New York, said as to a military commander's exemption from obedience to the writ of *habeas corpus*, Appendix, D.)

Blackstone, 1 Com., 135, cites the statute 16, Car. 1, which says: If any person be restrained of his liberty by order of any illegal court, or by command of the King's majesty in person, or by warrant of the council board, or of any of the privy council, he shall have a writ of *habeas corpus* to bring his body before the Court, who shall determine whether the cause of his commitment be just, and do as to justice shall appertain. Upon this he comments as follows:

"Of great importance to the public is the preservation of personal liberty; for if once it were left in the power of any, the highest magistrate to imprison, arbitrarily, whomever he or his officers thought proper, there would soon be an end of all other rights and immunities. Some have thought that unjust attacks even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole kingdom: but, confinement of the person by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, or less striking, and therefore more dangerous engine of arbitrary government. Yet sometimes, when the State is in real danger, even this may be a necessary measure. But the happiness of our Constitution is, that it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient: for it is the parliament only, or legislative power, that can authorize the Crown, by suspending the *habeas corpus* act for a short or limited time, to imprison suspected persons without giving any reason for so doing."

As before remarked, the suspension in this country gives no such power to the executive; because, unlike the King, it has, *ex-officio*, no such power of arrest; but, if Congress wishes to do so, it must confer the power on the President, as was attempted by the bill which passed the Senate, and was rejected by the House in 1807. On that occasion, Mr. Dana, a distinguished member of the House, from Connecticut, a jurist and a statesman, said: "This bill authorizes the arrest of citizens not merely by the President, but by any person acting under him. I imagine this to be wholly without precedent. *If treason were marching to force us from our seats I would not agree thus to destroy the fundamental principles of the Constitution, and commit such an act of despotism and pusillanimity.*" Chief Justice Taney has gone a step further than this, and decided, or at least intimated, in the Merriman case, that Congress can confer no power of arrest upon the President. If by "due process of law" the Constitution means that every prosecution, in all its stages, even

the incipient one of arrest, must be conducted under judicial authority, then the intimation is clearly right, for nothing is plainer, or better settled, than that Congress can confer no judicial power upon the executive. That such is the true meaning of "due process of law," is inferable from the clause saying, "no warrant shall issue but upon *probable cause*, supported by oath, and particularly describing the person to be seized. Now, what is probable cause? and what affidavit will support the allegation of probable cause? and what is particular description of the person? are all questions to be decided, and would seem by all analogy and precedent to require a judicial decision. Besides, the uniform practice is to that effect. If, then, Congress cannot expressly grant the power, the President cannot possibly have it by any process of construction or intendment; for all his power, being derived through the acts of Congress, it would be preposterous to contend, that, in authorizing him to use the army in putting down rebellion, a power can be implied to use the army in a manner which Congress could not expressly authorize. On the contrary, he takes the trust on the implied understanding that his discretion, as to the mode of using the power, shall not extend beyond what Congress could authorize, that being manifestly beyond its probable intention, which intention is his imperative guide and law.

3. THE CONSTITUTIONAL PROHIBITIONS.

First among these comes that which says: "The privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it."

It would be an act no less of presumption than supererogation, for any man to attempt to aid what Chief Justice Taney has said in the *Merriman* case, to prove that the whole power of suspension is with Congress, exclusively with Congress. His opinion will be cherished not merely as an enduring monument of official fidelity, but as a proud evidence of octogenarian ability. It will be cherished by the profession as a high, finished specimen of luminous, convincing judicial disquisition. Messrs. Lincoln and Bates have manifested only proper prudence, by shrinking from all attempt to answer what is so unanswerable. They content themselves with a feeble effort to dodge round it.

They admit that the power to prohibit the issuing of the writ can only be exercised by Congress, because it is a *quasi* repeal of a statute, which is legislation. With this admission it is difficult to understand even what they mean by the metaphysical sophistry with which they attempt a distinction between the power to issue the writ and the privilege of enjoying its protection. The prohibition was not made for the sake of the judiciary, but for that of the citizen. It is nothing to the judiciary to have the power, but it is all important to the citizen that the power should be kept in operation for his benefit. It is immaterial to him how he is deprived of the protection, whether by the legislature or the executive. The injury to him is the same. It is incredible, therefore, to common men and mere common sense, that the legislature should be so carefully prohibited from taking away his protection, whilst the executive was left free to disregard his right. This the more especially when it is remembered, that it is against executive officers that the writ is most generally, indeed almost exclusively, used; for it is they who most frequently make illegal, arbitrary arrests; and therefore it is they, in particular, more than all others, against whom he needs protection. They are bold, not to say desperate, who attempt to convict the Constitution of such an absurdity—not merely a self-contradiction, but a sort of suicidal self-nullification. It will be in vain to attempt to convince the nation, that the makers of that constitution were such mal-experts, that, whilst carefully prohibiting Congress from taking away from the citizen his judicial protection against executive oppression, the executive itself should be left free to oppress him at pleasure. Congress and the Executive combined can infringe the protection under cer-

tain prescribed conditions, yet the Executive alone is left to do it upon his own untrammelled discretion. If he was left free to oppress, why trammel Congress with restriction? This is mere lust of power run stark mad—so blinded by its eagerness for usurpation that it cannot see the most palpable absurdity.

If according to the concession the writ must issue, why shall it not be obeyed? It carries the imperative command of the law. Who shall dare disobey? Who, in this country, is above the law? Who enjoys that dispensing prerogative of suspending or silencing the law, for the attempt to exercise which an English King lost his head?

If either department, as between the Judiciary and the Executive, could properly be allowed, by mere intendment, a discretion as to the suspension of the privileges of the writ, it would seem to be rather that department which has its custody and control than that which is not so trusted, has no control over its issue, and against whom, in ninety cases out of every hundred, it ordinarily does issue. Yet it is agreed on all hands that the Judiciary has no such suspending power. Until the advent of Messrs. Lincoln and Bates, the opinion was equally unanimous that the Executive has no such power. They have not adduced, nor can they adduce, any respectable legal opinion to the contrary.

But yield the President the power of arrest, with the discretion to suspend the privilege of the writ, still, unless he make the arrest in person, he must issue some sort of warrant or order, verbal or written; and the Constitution says none such "shall issue but upon probable cause, supported by oath, and particularly describing the person to be seized." That old-time engine of tyranny, general warrants, will not do. There must be a special warrant for each case. It matters not who has the power of arrest, the Constitution is imperative that no warrant—that is, no order—shall issue except in the manner prescribed.

If, as claimed, the President's discretion over the privilege of the writ and his power of arbitrary arrest come by reason of the great confidence reposed in him by the Constitution, then this trusted power is personal, and peculiar to himself. He can no more transfer or depute this high discretion than Congress can depute its legislative, or a court its judicial power. The exercise of the discretion and power is unavoidably thus restricted to the President; and when so restricted he will confess that it is not worth contending for, as it can render little or no aid in putting down rebellion.

"No person shall be deprived of liberty without due process of law." It has been decided in numberless instances, by Federal and State Courts, that "process of law" means judicial process. It has also been uniformly so held by all statesmen. Now, the President, having no judicial power, nor power to issue or command the issue of any judicial process, how can he arbitrarily deprive a citizen of liberty—that is, imprison him—by his own order, or any mere executive process whatever? The pretension is absurd. The Constitution makes no exception of time or occasion when this rule need not be observed; it is laid down for uniform, constant observance, at all times and under all circumstances. This greatly strengthens the argument against the right of Congress directly to confer the power to arrest upon the President. It is absolutely conclusive against giving him the power to imprison. For whatever plausibility there may be in the idea that mere temporary arrest for the purpose of being carried before the proper functionary is not depriving a man of his liberty, within the meaning of the Constitution, yet to imprison him is certainly to so deprive him. If one of the objects of the imprisonment be to prevent his access to such functionary, or to his constitutional guardian, the court, it becomes a deprivation of liberty of the most flagrant, indubitably unconstitutional character. But Mr. Lincoln does not pretend that his arbitrary arrests and imprisonments have been or will be made with the exclusive view of bringing the arrested to trial, but boldly, frankly avows that it is done for the purpose of rendering the suspected "powerless for mischief until

the exigency is past;" that is, until this probably long war is over. The Constitution tells Mr. Lincoln plainly, emphatically, that he shall have no power thus to tyrannize over his fellow-citizens, that he shall not so imprison them; but he says he will.

This rule as to imprisonment, being so imperative, and without exception, it would seem to apply even during a temporary suspension of the writ of *habeas corpus*, so that there could not be even then a legal imprisonment, without some sort of judicial order. However much this construction may seem to some persons needlessly to hamper the efficiency of the Government in putting down rebellion, there need be no surprise at its being so arranged, for some of our wisest statesmen were earnestly opposed to allowing anybody, even Congress, to suspend the writ. Many eminent writers in England and Europe have expressed the opinion that its suspension should never be allowed in a Republic. The argument *ab inconvenienti* might rightfully induce Congress, during a suspension, to consider a mere arrest as a *quasi* ministerial act, such as the Executive might constitutionally be empowered to perform; but whenever it comes to formal imprisonment, for the mere purpose of rendering a freeman "powerless for mischief," then the judicial functions must be brought into requisition. This may cause some inconvenience, some diminution of efficiency, as it certainly will require a large increase of deputy marshals and subordinate judicial officers; but better, far better that inconvenience and expense than trust arbitrary, tyrannical power in the hands of any man. So our fathers thought; so let us continue to think and act; so let us make the President know and act.

The argument says that Congress has the power, not the right, at any time to repeal the act giving the courts power to issue the writ, but attempts no use of the fact in illustration of the President's assumed power; and, therefore, the matter needs no comment. But it may be well to say that whilst this is true, it is equally true that such repeal would be a gross abuse of power, being contrary to the spirit and meaning of the Constitution, which are as much to be observed as its letter. For incontestably the Constitution contemplates that Congress shall always furnish a writ for the protection of citizens, except when, in case of invasion or rebellion, it may think public safety requires a suspension of that protection. Every sound statesman and lawyer will agree that a willful violation of the manifest spirit of the Constitution is morally as bad as an infraction of its plain letter.

The argument further says: "The President is a civil magistrate, not a military chief," and because of "the prevailing sentiment that the military ought to be held in strict subordination to the civil power," they contend the President was made commander-in-chief of the army, &c. "To call the Judiciary the civil power, and the President the military power, is at once a mistake of fact and an abuse of language." All this is a gross blunder. So gross is the blunder that it is incomprehensible how it could be committed by gentlemen of intelligence. If the commander-in-chief of the military is not to be understood as included when speaking of the whole "military power," in the name of common sense who can be included? The phrase, "the military in subordination to the civil power," is borrowed from English political enactments, law writers, and historians. In that country it has been uniformly understood not to class the king with the civil, but the military power. The military being always in strict subordination to him, there would be no significance in the phrase if it referred to him as part of the civil power. By "civil power" is meant the law administered by its own appropriate functionaries—the Judiciary. In other words, the distinct intention is that when the power of the sword and the power of the law come in conflict, the sword must yield. This is well illustrated by our State Constitutions, which, whilst making the Governor commander-in-chief of the military, adopt this phrase into their bill of rights, saying: "The military shall always be held in exact subordination to the civil power," or using some similar language. Surely so much pains would not have been taken to do this, if the Governor was in

tended as part of that civil power, when the Constitution had already placed the military in subordination to him as its commander-in-chief.

The result of the discussion is—*first*, the President has, *ex-officio*, no power of arrest, and none being conferred by Congress, he can have none. *Second*, but even if he has such power, no matter how derived, it must be exercised in the manner prescribed by the Constitution; that is, there must be in each case probable cause sustained by both, and an order of arrest particularly describing the person to be arrested, which cannot be issued by deputy. *Third*, the President has no power to suspend the privilege of the writ of *habeas corpus*, that power resting in the discretion of Congress alone, consequently even if his power of arrest and imprisonment were conceded, still the legality of the mode in which it is exercised is subject to Judicial investigation, and to this end, for the necessary protection of the rights of citizens, he, like every other officer is subject to the control of the law through its appointed functionaries.

Here might appropriately close a mere review of what purports to be the opinion of the Attorney-General, but which carries with it ample grounds for suspicion that it may not be an opinion, but only the argument of an official advocate. But this is not intended as such mere review, but as a comment on that and analogous topics. Among these is that kindred one of martial law, which, for abundant reasons, no doubt, both the President in his message, and the Attorney in his opinion, carefully abstain from saying one word about, though the authority to declare martial law issued coterminously with that to suspend the writ, and, of the two, is much the major usurpation of power. But the President's obsequious partizans in Congress have not been so abstinent or prudent. Some of them infer the uselessness of the protection of the writ, in the presence of assumed power to declare martial law, whilst others argue in favor of the latter power from the assumed power over the writ. The subject, therefore, cannot be properly disposed of without some notice of the claimed power to declare martial law. But, as this has already been done by the writer, at some length, in a printed pamphlet, what is now to be said will be as brief as practicable.

4. MARTIAL LAW.

The books furnish no better definition of martial law than that given in Jacobs' Law Dictionary: "The law of war that depends upon the just but arbitrary power and pleasure of the king or his lieutenant. He useth absolute power, so that his word is law." "A distinction should be made between martial law, as formerly executed, entirely at the discretion of the crown, and unbounded in its authority either as to persons or crimes, and that at present established, which is limited as to both." In other words, martial law is the will of the military commander who proclaims it.

As agreed on all hands, it has been forever abolished in England since the petition of right, has not been known there for near two centuries, has been held by Lord Loughborough to be incompatible with the genius of the English Constitution, and, all authorities concur, can only be established by the omnipotent power of Parliament.

Are we liable to such a law in this country? Can our free citizens be made the slaves of a military despot? That is the question. Our Generals have been authorized by President Lincoln, so far as he could authorize, to proclaim martial law, and Gen. Fremont has actually proclaimed and is now enforcing it over some hundred and sixty thousand of our countrymen at St. Louis; this, too, without any proclamation of rebellion against that city, or against the State of Missouri. Any State adhering to the Union is equally liable to be treated in the same way. It is, therefore, a pressing question of the greatest moment to the whole nation.

As far as can be ascertained, and as believed, there was no attempt to establish martial law during the seven years' war of the Revolution. Nor was there any during the three years' war of 1812, except that of Jackson, which,

as before stated, was first condemned as illegal and void by an intelligent court martial, then by the District Court of the United States, and afterwards by the Appellate Court of Louisiana.

Judge Bay, of the Appellate Court of South Carolina, thirty or forty years ago decided in the same way, saying: "If by martial law is to be understood that dreadful system, the law of arms which in former times was exercised by the King of England and his lieutenants, when his word was the law and his will the power by which it was exercised, I have no hesitation in saying that such a monster could not exist in this land of liberty and freedom."

When the question of the refunding of Jackson's fine was before Congress, the subject was referred by each House to its Committee on the Judiciary. The report of the Committee of the House of Representatives was written by a member who has since obtained such an enviable reputation for pure, enlightened, unimpassioned statesmanship, as Senator Pearce, of Maryland. The report speaks thus:

"Your committee do not think that the military commander has any rights or duties paramount to the Constitution, from which he derives his commission. If such officers do possess powers above the Constitution and the law of the land, of the extent and application of which they, and they alone may judge, and if the Constitution and law cannot protect the citizen against the exercise of such extraordinary, undefined and undefinable powers, then is our frame of government a solemn mockery—they are our bills and declarations of rights idle and unmeaning forms, and the boasted liberty of an American citizen is but an empty sound.

"It would be still more monstrous if, besides suspending the *habeas corpus* and detaining a citizen, it should be claimed to try and execute him by martial law, which is not tolerated in England, nor in any country except where despotism reigns.

"This doctrine of *necessity*, which at one time is said to abrogate the Constitution and all law, and at another to justify the invasion of a part of free-men's privileges that the rest may be preserved, has long been known as the *tyrant's plea*. It is not tolerated in England, no matter what may be the distemper of the times; and while it is palpably incompatible with the principles of American freedom, it is also directly met and expressly denied by constitutional provisions.

"The country may, in consideration of great services, and upon atonement made, excuse the individual who has violated these principles; but whenever they yield submissively to the invasion of these rights—*whenever they are prepared to admit the tyrant's plea—they are fit only to be the tyrant's slaves.*"

A briefer report from the Senate's committee, written by Mr. Berrien, condemned martial law with equal emphasis.

But now we have the Rhode Island case 7, How, which is claimed to recognize the right to establish martial law in this country. It may be said of that case, or, at least, of the opinion delivered in it, without fear of contradiction from any intelligent lawyer, that it is crude, ill-considered, and most loosely expressed.

The question presented for decision was the validity of a statute of the Legislature of Rhode Island which professed to "establish martial law over the State," and whose validity had been recognized by its Courts. The Supreme Court decided that this being a matter of pure local statute law, its decision, according to uniform usage, must conform to the decision of the local Courts. This being decided, there was nothing left in the case, and the remainder of the opinion is mere *obiter dictum*. So far as the *obiter dicta* of Chief Justice Taney in delivering the decision may be construed into an implied concession that Congress may establish martial law they are in direct conflict with his recent decision in the Merriman case. But it is due to him to say that there is not the slightest intimation of any such power in the President or other military commander, and the recognition of the power

in the Rhode Island Legislature was, no doubt, caused by the fact of the people of that State living then under the old colonial charter, without the protection of a written Constitution or bill of rights. From this fact, he and the State Court most probably inferred a power, like that of the omnipotent Parliament, to establish martial law.

He seems to have labored under some loose impression that there was some other and different kind of martial law intended by the Rhode Island Legislature than that formerly in use in England, known under the significant definition of the will of the "military commander"—something between that and the law of Congress, or of a State, for the Government of the army or militia; for he says: "No more force, however, can be used than is necessary to accomplish the object; and if the power is used for the purposes of oppression, or any injury willfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable." There is nothing of arbitrary power in this, but the reverse. It is nothing but the kind of power which the military may lawfully use, and must use, when called in aid of the civil authority to suppress rebellion, and entirely within the limits of the military law as prescribed by Congress. Again, he says: "We forbear to remark upon the commissions anciently issued by the king to proceed against certain descriptions of persons by the law martial. These commissions were issued by the king at his pleasure, without the concurrence or authority of Parliament, and were often abused for the most despotic, oppressive purposes. They were finally abolished and prohibited by the petition of right. But they bear no analogy in any respect to the declaration of martial law by the legislative authority of the State, made for the purpose of self-defense when assailed by an armed force."

This shows he must have labored under the delusion referred to; yet he could scarcely have committed a greater mistake. There is not, never was, any such intermediate kind of martial law. The books furnish no trace or intimation of anything of the kind. The old martial law is the only one known or ever heard of. Consequently that and none other must be what is meant whenever martial law is proclaimed by statute or military order, under that name or designation. Consequently, also, what he seemingly makes the Court say can have no bearing on the matter under discussion, except as a strong intimation against the power of even an unrestrained Legislature to establish the old, the only martial law in this country.

The decision out of the way, how, then, does the matter stand, on principle and analogy. To declare martial law is to make law. It is to make law of the very highest character; for it supercedes all other, and, in effect, repeals all other law, and puts this law in their place. Now, to make law or repeal law is legislation, and the whole legislative power of the nation, so far as confided to anybody, is granted exclusively to Congress. This argument alone, if there were no other, would be perfectly conclusive against the power of the President to declare martial law. For nothing is better established on principle and by authority than that the President cannot legislate—that is, make law. To permit him to do so would pervert and subvert all the great purposes for which the Government was so carefully divided into separate departments. Consequently if martial law can be established at all, it must be done by Congress. Can Congress do it?

That it cannot is obvious. *First*. Because the Constitution says: "The right of the people to be secure in their persons, houses, property, and effects against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." Every one of these rights thus intended to be guarded are infringed by the exercise of martial law. This must be so, for otherwise there could be no reason for martial law, the civil authority already having ample power within those limits—unless, indeed, martial law is intended to try and punish offenses by some speedy, summary method not known to law.

This brings us to objection *Second*. Because the Constitution says: "No person shall be deprived of life, liberty, or property without due *process of law*." That is, by the law of the land, under the administration of its assigned functionaries—the judiciary.

Third. Because the Constitution guarantees to an accused a speedy public trial by jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for his witnesses, and the assistance of counsel, all of which martial law dispenses with and disregards. If it did not, the civil law is sufficient, and there can be neither need or use for proclaiming the other. The utmost that the usages of martial law allow is a drum-head court martial, and even for that much the accused is dependent upon the discretion of the commander. He can dispense with all modes of trial, and order an accused to be shot for anything he chooses to call an offense without any investigation whatever.

These guaranties of the Constitution are without exception as to times of public danger, or for any supposable case of State necessity, and are, therefore, to be always observed under all circumstances. Congress has no discretion to disregard them. They clearly prevent Congress from declaring martial law. This construction is fortified by the denunciation of martial law in the Declaration of Independence and its express prohibition in all the State Constitutions, which, being general grants of all power, with specific exceptions or prohibitions, were supposed to require, out of abundant caution, the special inhibition of martial law. But the Federal Constitution contains only a grant of specified powers, with an express reservation of all power not granted, and, there being no grant of power to establish martial law, there was no need for its special prohibition.

But concede the power, can it be transferred to the President? No more than Congress can divest itself, by transfer, of any other or all its legislative power. As before said, to declare martial law is legislation, a class of power which he cannot exercise—one which, according to the fundamental division of the Government into departments, is denied to him and confined to Congress.

Still there is necessity, State necessity, the law of self-defense, self-preservation, inherent in all Governments, which, it is said, Constitutions cannot take away—a higher law, which overrides all Constitutions. There is no reasoning with higher-law men. They are a law and a reason to themselves. To those not of that class a short argument will be sufficient. Whatever force there may be in the argument that Government cannot rightfully take from an individual the necessary right of self-defense, still it cannot be denied that Government has the power to impair that right most materially. For instance, it has the power, not the right, to deny the right of killing in self-defense. With much greater propriety can a nation when instituting Government—that thing of its own, for its own benefit, in which no other person has a distinct, separable interest—limit its bantlings, means and powers of self-defense. Whether wise or unwise, it has the power, the just power, of saying: Let the Government perish rather than it shall do certain things. The perfect equity of such a declaration is apparent as soon as we reflect how disputable is what is and what is not necessary to Government self-defense. The nation has the perfect right—nay, it is an imperative duty of self-defense, of self-preservation, to judge all this matter in advance, and say what the Government may or may not do at any time and under all circumstances. This is perfectly indispensable to the preservation of civil liberty, and, however it may be in other countries, the preservation of civil liberty was the great paramount object with the founders of our Government; because in its preservation was deemed to be involved the happiness and prosperity of the nation. Unless, then, he and others thinking with him can prove to the satisfaction of others that they have more wisdom than the nation, together with more interest in the preservation of its Government, there cannot be, even

theoretically, any just claim to a higher law which shall override the Constitution and limit the nation's rightful power in this particular.

"There is no life for liberty but in the supreme and absolute dominion of law. This lesson is written, in letters of blood and fire, all over the history of nations. It is the moral of the annals of republics ever since their records began. Whenever men have thought great thoughts, and died brave deaths for human rights, its everlasting truth has been proclaimed and sealed with patriot blood."

But suppose there was, which there is not, a proper analogy between the right of individual self-defense and that of Government self-defense. Let us see how the matter stands in that view. Before an individual can take the law in his own hands and kill in self-defense, he must be driven to the wall. The danger must be immediate, imperative of death or grievous bodily harm, with no other means of probable escape, before he can take life in self-defense. Now, will it be seriously contended that this great nation of twenty millions is in the presence of such immediate, imperative danger, is so driven to the wall, that the incarceration of some fifty or a hundred suspected men in Maryland or Missouri, or the declaration of martial law, is absolutely, indispensably necessary to its preservation? Yet that proposition, absurd as it is, must be proven before the higher-law doctrine can be brought to bear, or before the tyrant's plea can have any application. It is even doubtful whether arbitrary arrest and martial law in a country like this, of sparse, scattered population, are any material aid in suppressing rebellion. It is also doubtful whether they can be such aid in the defense of an open, unfortified city like Baltimore or St. Louis, having a thousand points of ingress and egress, and which has to be defended from without and not from within. But concede that they are a material aid, still it cannot be contended that they are, like the knife or the pistol used in personal self-defense, *indispensably* necessary—that they afford the only probable means of escape from its danger. Not being so indispensably necessary, they do not fulfill the conditions of the doctrine of State necessity and Government right of self-defense.

Let us leave higher law, State necessity, and this overmastering right of Government self-defense in that grave, without resurrection, where our fathers fondly hoped they had deeply buried them, together with all the other accursed enginery of tyranny.

Mr. Lincoln need not flatter himself with the hope that posterity, or even the present generation, will accord him absolution for his usurpation and arbitrary abuse of power by reason of the equally great or even greater atrocities perpetrated at the South against civil liberty. That is an example for his avoidance, not his imitation. Two wrongs never make a right. Because a murder was committed at Lexington, that is no reason for permitting it in Louisville. Because six million of our countrymen are suffering tyranny, that is no justification for his making the other twenty million suffer it also. On the contrary, the relief of those six million is the best of his whole string of arguments for his war of invasion against the South. His inestimable prestige as the vindicator of the Constitution and the law against causeless rebellion is taken from him when he himself tramples on the Constitution and laws. He sinks himself to the level of the rebel President, and becomes the mere lawless chief of a rebellion against the Constitution.

5. THE TWO WARS.

The nation is now afflicted with two terrible wars going on together. The war against the Union, and a war against the Constitution, are being waged simultaneously. Each wears a threatening aspect of great peril. Which presents the greater peril it would be difficult to decide. Which, if successful, will be most calamitous, men of intelligence will have no difficulty in deciding, even though they knew that a large majority of our countrymen might decide differently. So, in determining which of the two is the worst treason—the war against the Union, or the war against the Constitution—men will differ in

the same way. A patriot can side with neither war, but must resist them both. He must do this, even though he brings upon himself an imputation, from the ignorant, that he thereby favors one of these wars. The patriotism is of little worth which cannot bide the scathing of such imputations.

Independence was a great achievement, but the establishment of civil liberty was a greater. The former was comparatively of little worth without the latter.

The Union is an inestimable, national benefit, but the Constitution is a still greater national blessing. The principal value of the Union lies in the preservation of the Constitution. The Union is the vase containing the precious ointment. Let us not permit the destruction of the ointment for the sake of the vase. "We cannot yield the jewel to retain the casket." The preservation of the Union is worth a high price, an immense price, but it is not above all price. We cannot afford to give the destruction of the Constitution as that price.

We may be said to owe a double allegiance—one to the Union, the other to the Constitution. Which is paramount, enlightened patriotism will have no hesitation in deciding. The one is allegiance to mere territorial limits, whilst the other is also allegiance to civil liberty. The one looks mainly to the physical prosperity of the nation, whilst the other looks to its moral well-being, its means of permanent happiness. The one is the ordinary patriotism of all nations, whilst the other is peculiar to our ourselves, expanding as it does into a noble philanthropy, embracing the deep interest of all Christendom. The preservation of our Constitution in its supremacy, its sanctity, its inviolability, is a great interest in the cause of civil liberty throughout the world. Its destruction would be the putting out the last lamp of hope to the nations. They would mourn in rayless, hopeless gloom. The double fealty to Union and to Constitution beautifully blended into one, is that double fealty to country and to liberty making the proud *distinctive patriotism* of our countrymen.

Whilst we leave it to President Lincoln, with an army of five hundred thousand men and a powerful navy to resist the war against the Union, every citizen should gird himself for the contest in resisting the other war against the Constitution. In this resistance we can expect no aid from the President, for he himself is the commander-in-chief of all the aggressors. Neither can it be expected from Congress, subdued as it is into absolute obedience to the President by his five hundred million patronage. Neither can it be expected from any of that large class, disseminated throughout society, who are thirsting for a taste of the Pactolian stream distributed by him. The odds are terrible but let us not despair. The imminence of the peril should only serve with true hearts to nerve them the stronger.

The celebrated report on retrenchment, made in 1826, by a committee of the Senate, of which Mr. VanBuren, Mr. Benton, and other distinguished men were members, said: "Patronage will penetrate this body, subdue its capacity of resistance, chain it to the car of power, and enable the President to rule as easily and much more securely with than without the nominal check of the Senate.

"We must look forward to the time when the nomination by the President can carry any man through the Senate, and his recommendation carry any measure through Congress; when the principle of public action will be open and avowed—the President wants my vote, and I want his patronage. What will this be but the government of one man; and what is the government of one man but a monarchy? Names are nothing. The nature of a thing is in its substance, and the name soon accommodates itself to the substance."

Yet the gentlemen who made this report never supposed that this one-man power would clutch us in less than forty years; they never imagined an annual patronage of five hundred million.

President Lincoln, by way of extenuation for his usurpation, in his attempt to suspend the writ of *habeas corpus*, asks, in his message, "Are all the laws but one to go unexecuted, and the government itself to go to pieces, lest that

one be violated?" intimating thereby that he has, at most, been guilty of violating only one law, one infraction of the Constitution. Let us see.

The following powers are given exclusively to Congress:—1. To increase the army. 2. To increase the navy. 3. To appropriate the nation's money. 4. To regulate commerce with foreign nations. 5. To regulate commerce between the States. 6. To contract debt on behalf of the nation. 7. To suspend the writ of *habeas corpus*. The following powers are denied to both Congress and the President:—1. To proclaim martial law. 2. Arrest without a legal warrant. 3. Imprisonment or other punishment without conviction upon legal trial. 4. Punishment under *ex post facto* or non-existing law. 4. The introduction of *lettres de cachet*, Bastilles, and the midnight secret proceedings of the Inquisition. 5. The interdiction of exports. 6. The favoring of some ports to the prejudice of others. 7. The regulation of the commerce of a State within its own bounds. 8. To impair the freedom of speech and the press. 9. To "infringe the people's right to keep and bear arms." 10. To make unreasonable searches or seizures. 11. To prohibit emigration, or require a passport. 12. To dismiss the police of a city, in an unproclaimed State, and appoint others in their place. Here are nineteen important laws, or constitutional provisions, which he has grossly, wilfully violated. His usurpations are so extensive, that it would narrow the inquiry to ask, what law or constitutional provision he has not violated, rather than to ask which he has violated or usurped upon. The rights, the safe-guards he has taken away, are greater, far greater than those he has left. It is not a question whether we shall overlook only a single usurpation as he claims, but whether we shall countenance such multifarious usurpation; whether the rights and powers he has left to the nation, to Congress, or the Judiciary, are really worth as much as those he has stolen. These thefts are not to be countenanced or excused under the pretext of putting down the rebellion, for if he cannot put it down with an army of five hundred thousand men, and a powerful navy, without trampling on the Constitution, it is because the thing cannot be accomplished, and he could not do it with all the power that could be accumulated into his incompetent hands. He has, with the butt-end of his implement, mauled the Constitution to pieces, and with his foot upon its fragments, he bids the nation an insolent defiance.

To all this usurpation a venal Congress yields a servile acquiescence, and, notwithstanding the oath of its members to support the Constitution, they accord him the indemnity of their approval. They even aggr. him on to further usurpations, to other excesses. One Senator asks leave to introduce a bill to abolish slavery in the rebel States. Another says his party will graciously forbear abolition as a means of subduing rebellion, unless it should become necessary; but, if it cannot be done otherwise, they will proclaim abolition, and almost undisguisedly utters the threat of inciting a servile insurrection; that is, they will cause the desolation of eleven States; they will incite a domestic enemy in every household, with knife and torch, to the work of destruction; they will cause the indiscriminate massacre of the innocent women and children of eleven States. The worst spirit of all pandemonium could not conceive a more infernal purpose. This son of New England may think that any amount of blood and treasure will be well spent, rather than she shall be deprived of the monopoly of the finest market in the world for her manufactures and shipping. He may think that this war is "a thing that will pay;" unlike the last war with England, which New England would not support because it was "a thing that would not pay," and to get rid of which she loudly threatened *secession*. But he should bethink himself before he desolates those eleven States, whether New England can afford much blood or treasure in killing the goose that lays the golden egg for her benefit.

Another Senator, a reputed leader, said he proposed to lend the President the whole power of the country—arms, men, money—"and place them in his hands with authority almost unlimited." "I want," he said, "sudden, bold, determined, forward war; and I do not think anybody can conduct war of that

kind as well as a *dictator*." This is the avowal of the deliberate purpose to commit foul treason against the Constitution in shameless disregard of his oath for its support. These atrocious sentiments he deliberately uttered twice in the Senate without any adequate rebuke. Had they been uttered in the Revolution Congress they would have met a withering rebuke. Tradition tells us that at the gloomiest period of the Revolution, when a British army was ravaging Virginia, a proposition was made in her legislature to make Patrick Henry dictator. The patriot Corbin, a warm friend of Henry, rebuked the proposer, and silenced the proposition, by calmly saying: "Your dictatorial crown to his brow, my dagger to his heart." That was the appropriate, indignant manner in which the true men of the Revolution rebuked such infamy. Tradition has leniently forborne to transmit the name of that proposer. But our modern proposer has secured himself against oblivion. In enduring print he stands self-gibbeted, as a lasting object for national scorn and indignation. Perhaps he thinks he can afford this. He no doubt looks for a high reward. The papers tell us he was promptly offered the reward of a Brigadiership. This he sensibly refused. He deserves much more than that. Why, the papers tell us that a Representative from Maryland was paid that much for publicly thanking the President for the ignominious degradation of his State. If those papers speak true, another adulator is to be rewarded with a Supreme Judgeship for equalling the illustrious rail-splitter with Washington—ay, showing that he is to be a greater national benefactor than even Washington. Now this Senator has not only bestowed nearly equal adulation, but by votes, and profuse public promises, has shown himself prepared to gorge the utmost greed of the President for power. He wants him to become a dictator. What position can be too high pay for him?

In a former, recent publication, the writer, from faith in the President's supposed amiability and reputation for integrity in private life, gave him exemption from an imputed design to erect despotic power on the ruins of the Constitution for his own benefit or that of his party. That exemption must now be retracted—more recent developments have destroyed so much faith in that amiability and reputed integrity. His perseverance, since the meeting of Congress, in reiterated gross, wanton, useless violations of the Constitution shows that he has no consideration, such as an honest man would have, for the obligations of his oath to support the Constitution, or the obligations of duty as a citizen and a President. Whatever he may have been in private life, he has shown himself anything but amiable as a President. Those developments, in connection with the terrible disclosure of views by his indiscreet partisans on the floors of Congress, require doubts to be substituted for that exemption. Whether he lacks intelligence to see the infinite, permanent injury he is inflicting upon the country by his bad example—whether he is possessed by the weak man's foible, and is seeking vengeance for all the opprobrium cast by the South upon himself and his party—whether he has joined a conspiracy for giving himself, or party, permanent power on the ruins of the Constitution—or whether he has blindly yielded himself to the guidance of bad men who have fastened themselves upon him, and who will surely lead him to his own perdition, or that of the country, must be left for after-developments to determine.

As an indication of the purpose of the reigning party to clothe its chief with dictatorship, all notice should not be omitted of a bill pending before the Senate at the adjournment of Congress, which would have passed if there had been time, as proved by test votes, and which, no doubt, will pass at the next session. It substantially gives the President or the military commander power to declare martial law over any State or district proclaimed to be in rebellion. It says, "the commander shall make such police rules and regulations as he may deem necessary to suppress rebellion, and all the civil authorities shall be bound to carry said rules and regulations into effect;" but if they fail to do so, then the commander shall enforce them. What is meant by police regulations "necessary to suppress rebellion" no man can tell, unless it

means, as it seems to do, such as the commander may choose to think necessary. Here is power to be given, and a command to legislate over an entire State. Nor is this confined to such States as have no organized civil government, except such as is aiding rebellion, but applies equally to any State which the President may choose to declare in rebellion, though it has a loyal government honestly aiding in the suppression of the rebellion. Another section suspends the writ of *habeas corpus* as to all persons "detained by military authority," without saying how long the suspension shall last. Another section says, "all persons found in arms against the United States, or *otherwise aiding their enemies*, shall be detained as prisoners for trial, or may at once be placed before a court martial to be dealt with according to the rules of war in respect to unorganized armed bands not recognized as regular troops." What those rules of war are the writer does not know, but supposes they authorize death. But what every lawyer and every man of intelligence does know, is, that this is a most disgracefully loose mode of legislation, even if Congress had the power—this referring to the unknown and unascertainable "rules of war" to determine whether a citizen shall be shot by order of a court martial, or shall have a fair trial by the law of the land. If a citizen not in arms is found doing what a court martial may choose to think an aiding of the rebels, he may be instantly shot. This is splendid legislation for a free Republic. What an admirable engine for tyrannical persecution. Jackson thought a respectful published remonstrance against the continuance of his martial law, long after the defeat and withdrawal of the enemy, was an aiding of the enemy, and prosecuted the publisher before a court martial. Why may not a packed court martial think that any spoken, written, or printed censure of the President, the commander, or one of their subordinates, or any other trivial matter at which either may choose to take personal offense—such, for instance, as censure of Abolitionism—is an aiding of the enemy.

Another section, in the tenderness of congressional mercy, says that sentence of death shall not be inflicted upon persons "taken in arms" without the approval of the commander of the military district, leaving the persons taken not in arms to be immediately executed without any such approval.

The two sections, taken together, authorize the commander of a military district, and his packed court martials, to institute an indiscriminate massacre of all prisoners however and for whatever taken, contrary to the usages of all civilized warfare, even among hostile nations, and which usages, as all publicists agree, are the least bloody that should obtain in carrying on civil war. (See sections of the bill, Appendix E.)

If there be a lower depth of infamy not yet attained in these times of political prostitution and reckless subserviency to power, this bill, when passed, will plumb that depth. Baseness can dive no deeper into the pool of degradation. To permit a packed court martial, contrary to the usages of civil war, recognized in all the civil wars of England and in our own long revolutionary war, to authorize the massacre of prisoners taken with arms in their hands, would be a lasting disgrace inflicted upon the character of the nation, for which even the lives of every member voting for the bill would be little more than an adequate atonement. Their lasting disgrace, with every intelligent man here and abroad, now, and in the long future, is a part of the penalty they will certainly have to pay. So keen is their appetite for blood and vengeance, that they are reckless of the fact, that such a procedure necessarily involves the equal massacre of all northern men taken prisoners by the armies of the South. But, worse than even this, if worse there can be, is the permission to a packed court martial to authorize the putting to death by a military commander of any citizen or citizens he may choose to say were aiding or abetting the rebels. What sort of aiding or abetting shall authorize the infliction of death the bill does not say. That is all left to the discretion of our military masters. Now, the degrees and modes of aiding and abetting are infinite; some authorizing the imposition of

only a small fine, others a short imprisonment, ascending, like other crime, in gradation, until the attaining of such aiding and abetting as amounts to treason, which deserves death. All these are massed together without discrimination, the military being authorized to inflict death for the lightest as well as the greatest. These men have not the sense, or, if they have the sense, they have not the mercy, to discriminate between a public trial before a court of law, by an impartial jury, both court and jury acting under an imposing responsibility to the public sense of justice, and a trial before a drum-head court martial. The court and jury are trammelled with legal precedents of a thousand years, strictly defining what is an aiding and abetting of treason within the meaning of the law. On the other hand, the court martial is trammelled with nothing but their own discretion, or, rather, their subserviency to their commander. A political opinion differing from that of the ruling party, an imprudent word, written or spoken, of complaint against our masters, or any other trivial matter, may be made the pretext for the assassination under the sanction of this bill.

Have we come to this? Does a political party dare thus attempt to confer such an engine of tyranny upon their party chief—thus clothe him with the power of merciless persecution against their opposers? Do they think that all sense of justice, all appreciation of liberty, is dead with the nation—that nothing can arouse it from its lethargy? Are we to permit the fastening upon us martial law—that is, the will of a commander—in lieu of law, under the new phrase of “police regulations,” or the old one of “aiding and abetting,” expounded by military despots?

Mr. Lincoln has not waited for the passage of this bill. Martial law has already been proclaimed at St. Louis, with an accompanying declaration that all infraction of its rules will be “promptly punished;” three newspapers have been suppressed, and quiet citizens of the first respectability arrested and deported to distant Bastiles; this, too, without any proclamation of rebellion against either the State or the city.

Mr. Lincoln can easily create a rebellion whenever he wants one. To do this he need only repeat in any State having the semblance of power to resist what he has already done in the two unproclaimed States of Maryland and Missouri, and he will have, not rebellion in aid of disunion, but within the Union, under the national flag, against unconstitutional oppression. When he has created the rebellion he can issue his proclamation, and then will come this act of Congress pretending to legalize his dictatorship. His partisans may pretend to think his discretion may be safely trusted not to abuse such power; but the Constitution places no such reliance on any man's forbearance or discretion. Neither is the nation disposed or bound so to trust him or any other President. He who could allow, without even public rebuke, three repetitions of wanton massacres by his German soldiers in the streets of St. Louis of unoffending men, women, and children, and he who imposes such needlessly rigorous imprisonment upon citizens as respectable as himself or any member of his Cabinet for no cause but that of their political opinions in favor of the right of secession, deserves not to be so trusted.

As to a practical dictatorship, that is past praying against. We already have a dictatorship. With a subservient Congress, with an obedient enormous army, with an active assisting civil corps of a hundred, and soon to be increased to two hundred thousand, with hundreds of thousands of partakers and of hungry seekers of patronage, with a muzzled press and a powerless Judiciary, Mr. Lincoln is now the master of this nation. His will is everywhere law. The dictatorship is in full force. All that is left for us is to do what we may to prevent its becoming a permanent institution.

The higher-law doctrine, that last refuge of fanaticism, after a thorough defeat in the field of argument, was forever buried, as it was hoped, under an immovable load of national contempt and odium. But we find it now not only resuscitated into new life, but with vastly increased vigor. From the mere shibboleth of a powerless faction of fanatics, it has been inaugurated by the

President and his higher-law Cabinet into the ruling principle of the Government. They have cunningly dropped its old name of odium and reproach, substituting that more imposing one, the law of war. They tell us that ours is a mere fair-weather Constitution—not made for the stormy weather of war or rebellion; that whilst peace has its Constitution and laws, war has also its appropriate law, superceding the other—this supreme, paramount law of war being the unbridled will of its commander-in-chief. This is the recognized higher law of the day, which is openly claimed to be above all constitutional restraint. It is, on a larger scale, what has been long known in this country under the name of lynch law.

What a calumny upon the great founders of the Republic to say the frame of Government formed by them with so much care was intended merely as a fair-weather Constitution! It contemplates wars and rebellions, and gives the needful power for dealing with both; yet it was intended not to have sway during war or rebellion! During war and rebellion it was to be suspended—and by what? By that thing, of all others the most abhorrent to the men of the Revolution—that then detested and forever execrable thing, a military despotism. If military despotism can ever be an indispensable aid in carrying on war, it must have been for precisely that seven years' war through which they had just passed—a feeble people struggling for independence against a powerful enemy, aided by tens of thousands of Tories and traitors. If ever there was a military commander fit to be trusted with arbitrary power, they knew Washington to be that man. But they gave him no such trust; they acquiesced in no such supposed necessity for military dominance; but, by their proud, successful example, gave the lie to the foul imputation upon republican institutions, and taught their posterity that there never could be need, under any circumstances, for a military dictatorship.

Again, we have the example of the last war with England, as righteous a war as was ever waged by one nation against another, yet during its whole progress denounced by a powerful political party, in and out of Congress, by public speeches and the public press, together with endless charges of corruption and imbecility against the Administration. Such was the ascerbity and untiring zeal of that party, that, having entire political control of New England, it rendered the whole of that large part of the nation's population and wealth almost perfectly neutral in the war, giving the Government no aid, but hanging upon it like a palsied limb. During the sacking and burning of Washington City, and the immediately succeeding attack on Baltimore—in fact, during the years of rigorous blockade of our ports, the opposition never ceased to thunder forth their denunciations against the war and the Administration. Did the Administration resort to arbitrary measures to silence this opposition, or to protect itself against the secret machinations of suspected spies and traitors? Not so. No man, no press was disturbed for political opinion. If the policy of the present Administration had been pursued, not a prominent politician or editor of the Federal party in New England would have been left outside a jail. But President Madison and his Cabinet were imbued with the true spirit of the Revolution. They recognized the supremacy of the law as the indispensable price of liberty, at all times, and under all circumstances, and they bowed to it in willing obedience.

The pretext of any absolute necessity for the arbitrary unconstitutional measures now adopted as an aid in suppressing rebellion is a mere sham. It is a pretext gotten up, not for national protection, but for political persecution. It is a mere absurdity to contend that the protection of this great nation of twenty million needs the institution of martial law—the arbitrary, lawless suppression of a few newspapers—and the imprisonment of a few hundred suspected persons, scattered through the country. Party vengeance, not national safety, must be the true motive. All that those presses and suspected persons could possibly do, would not impair the strength of the Government half so much—nay, not a tenth part so much—as such manifestations of a deliberate purpose of the President to cast himself free from all constitu-

tional restraint, and to put himself above the law. Such a course, if there were no alternative, would drive tens of thousands of loyal Union men to the dire alternative of aiding either the rebellion against the Union or the rebellion against the Constitution. But there being another, a far better alternative, they will aid neither. Hence, tens of thousands of those who otherwise would be active, zealous supporters of the Government, are driven into inactive neutrality, and to that extent its strength is crippled and impaired.

The whole theory upon which the policy of arbitrary, illegal coercion rests, if not mere "pusillanimity," as said by Mr. Dana, is a total misconception of the character of our people. There is nothing in the whole circle of Government or individual operations which they hold in such utter abhorrence as arbitrary, illegal oppression. Give the enemies of the Government the means of playing upon, exciting this feeling, and you furnish them an aid of great potency, whilst you correspondingly weaken the Government. Look at the opposite examples of Kentucky and Missouri. The latter had, at the commencement of these troubles, as proved by the elections, a much larger proportion of Union men than the former. They both had the misfortune of having Governors and Legislatures with secession proclivities, or, at least, sympathies. The true Union men of both States implored the President to let them alone—to leave to them the management of the seceders. The prayer from Kentucky was heeded, the consequence being that she was placed, and has been kept, in a position which Gen. McClelland has said is worth to the Government an army of forty thousand men. Missouri was not so fortunate. A malign influence intervened between her true Union men and the President. The policy of coercive intervention was tried upon her. The consequence was that her position now costs the Government an army of more than forty thousand men. So much for the coercion policy. It should never be forgotten that Americans are unused to coercion—are impatient under it—don't like to see it carried on; and, therefore, it should never be used but as a last resort—a dire necessity. The most respectable, intelligent, unwavering Union men of Missouri still insist that, beyond all doubt, if they had been let alone, the result would have been the same there as in Kentucky.

The writer was the first Union man in Kentucky who publicly advocated any sort of coercion as a remedy for the rebellion of the Southern States. This he did on the 10th of April last. In accordance with what he then thought, and still believes, was the almost undivided opinion of the thinking men of Kentucky, he said: "Coercion by an invading army is what no intelligent person does, or ever did, contemplate. The evils would be infinite, without any compensating benefit from such a course." What he recommended was the collection of duties on ship-board, off the Southern ports. The impotency of the Southern Confederacy to relieve itself from this sort of coercion, together with the burthen of taxation, would, it was thought, bring the Southern people to their senses. If not, then the forcible re-opening of the navigation of the Mississippi and recapture of New Orleans were looked to for accomplishing the object. This, with the addition of a rigorous blockade, is substantially the plan of Gen. Scott, as divulged in his conversation with the editor of the New York Times previous to the battle of Bull Run. Something like it is also believed to have been the plan of the President when he issued his first proclamation. The call for three months volunteers is full proof that he did not contemplate a serious invasion. No man of sense would have thought of depending upon that description of troops for an invasion. Rumor says he was driven from this policy, and made to adopt that of invasion, by the capricious dictation of nine or ten Governors of Northern States, rabid partisans, as indispensably necessary to the salvation of their party. Be all this as it may, it is worthy of consideration whether it is not still best to resume something like that original plan.

With an army of seventy thousand men to guard Washington, and threaten Virginia; another of twenty thousand to guard Fortress Monroe, and threaten Norfolk and Charleston; and another of forty thousand to guard Missouri,

and threaten Memphis, would put invasion from the South at defiance; whilst a comparative small army sent by sea might conquer and hold New Orleans. That place is so completely the heart of Louisiana that its conquest and holding would necessarily be followed by the immediate submission of the whole State; whereas the taking of Richmond, or any other Southern city, will amount to little more than the conquest of the ground on which the invading army will be encamped.

Louisiana detached, the Southern Confederacy is broken up. The Confederacy cannot last without her. Mississippi, Arkansas, and Texas must soon follow wherever she goes. The balance would be too feeble to hold together. Besides, the opinion has been, and still is, confidently entertained that, if the irritation of active war is removed, the people of the South cannot be brought to stand the loss of more than two cotton crops. This plan permits the reduction of the army to little over two hundred thousand—perhaps even less—with good hope of terminating the war in two years. According to the opinion of many men full as wise as Mr. Lincoln and his Cabinet the present plan does not promise a termination of the war in less than four to seven years, with an equal chance of proving unsuccessful in a permanent subjugation, and which, if successful, would leave the two sections in no condition of feeling to remain parts of the same nation.

A defensive war by the North, whilst it would not increase or intensify the bad feeling of the sections, is dictated by every principle of sound policy. Many sagacious men deem it by far the most expeditious mode of terminating the war. The North is far less interested in its speedy termination than the South. The maintenance of an army of two hundred thousand will soon exhaust the resources of the Southern Government, unless in repelling a war of invasion. In resisting that, their citizens will contribute the last dollar. In its absence, they cannot be induced to stand for two years enormous taxation and total loss of trade. If they attempt the disadvantageous policy of a war of invasion against the North, it would require two men to our one.

The raising of an army of five hundred thousand men, if at all practicable, which many doubt, is a thing greatly to be deprecated, and avoided if possible. Suppose the war successful, what is to be done with five hundred thousand armed men after it is over. The soldier's life is a comparatively easy one. After a few years men become fond of it. The pay is better than for any kind of common hard labor. Men and officers become disinclined to exchange for any mode of dull, propping industry. Let it be remembered that full one-half of these men will be foreigners, and that all will be greatly disappointed as to the amount of plunder they expect to gather. What will hinder them from helping themselves out of the Northern cities? These men will be the masters of the nation. There will be no means of resistance. They can do with the country what they please. It would be merely ridiculous to base any expectation on their supposed respect for the Constitution and laws after the lessons taught them by Mr. Lincoln. Apparent as it now must be to every one how impracticable is a sudden crushing out of the rebellion by the application of mere force, without waiting the aid of slower influences, the grand *desideratum* should be the keeping down of the army to the lowest possible number. Precipitation and precipitators have had their day. Their discomfiture accompanied that of Bull Run. All plans should be carefully revised, and precipitation should be no part of the one adopted.

It has been shown that the terrible blunder of coercive intervention in Missouri has lost, in what would have been her quiet neutrality, the equivalent for an army of forty thousand men, and, by throwing her into her present position, imposed a burthen on the Government equal to an army of forty thousand, the great result of the blunder being eighty thousand. The war of invasion has proved still more injurious to the Union cause. Previous thereto it was doubtful whether, upon a fair vote, the Union men were not the majority in most of the seceded States. Since then there are no Union men anywhere left, except in West Virginia, East Tennessee, and a few sparsely scattered

through Middle and West Tennessee. The war has consolidated the people, with that exception, into a unanimous, unchangeable spirit of resistance for as long as it may last. If it should be pushed actively forward for two or three years, the two sections will come to hate each other as bad as ever the English and French did. Such an animosity would leave a reconstruction of the Union scarcely desirable. Still immediate peace or a recognition of the independence of the seceded States is not to be thought of. If Louisiana is permitted to go, the peace would not last a year. The vast population on the upper waters of the Mississippi will never submit to her final separation; a mere free transit to and from the Gulf will not satisfy them. Having no vessels suitable for ocean navigation, what they need and will have is a market at New Orleans, encumbered with no sort of tax, where they can obtain their own supplies, and furnish Mexico, South America, and the Islands. The South is in no temper yet to yield Louisiana. She may be brought to that temper in eighteen months, if the irritation is not kept at fever heat by an active prosecution of the war. Satisfy the Southern people that the Government does not mean a war of subjugation or vindictive persecution, and it is next to impossible that a majority of them will continue to submit to enormous taxation and the loss of the sale of two entire cotton crops. They will force their Government to yield Louisiana and Western Virginia as the price of peace, though they may have a well founded fear that their Confederacy cannot last without Louisiana. The point of honor will be saved, their independence acknowledged, and they will trust to fortune for the balance. Should the ultimate result be the permanent separation of Virginia, the Carolinas, Georgia, Alabama, and Florida, that would be far better for us than the further prosecution of this war, whose termination no candid, intelligent man can pretend to foresee. But should the anticipated split of the Confederacy take place, that separation would not be permanent; but, after the lapse of a few years, reconstruction of the whole would be the most probable ultimate result.

There is some danger of reaction at the North, running to the extreme of a precipitate and improvident peace. This may come from any one of several causes—failure to raise troops, failure to raise money, another serious disaster in the field, or the interference of England or France. The timidity shown as to the amount of taxation, and its entire postponement for a year, indicate a want of confidence in the public sentiment of the North. The papers from that quarter tell us that enlisting already begins to drag heavily before the place of the discharged three months men has been supplied. The resignation of two hundred officers since the late disaster looks as if zeal was flagging. A defensive war, with a rigorous blockade, would not require half as much in men or money, and would be within the easy ability of the North. In the opinion of very many having the best means for judging the temper and resources of the South, this mode of conducting the war is the best for its speedy termination, and the only one for a reconstruction of the Union. It has the further recommendation of removing all pretext for any of those outrages on the Constitution which are filling the hearts and minds of good men everywhere with gloom and despondency.

APPENDIX.

A

EXTRACTS FROM CALHOUN'S SPEECH ON JACKSON'S PROTEST.

Under our system, all who exercise power are bound to show, when questioned, by what authority it is exercised; to show, in a word, the express grant of the power. // I proclaim it as a truth, as unquestionable truth, of the highest import, that the President has no right to exercise any implied or constructive power. I speak upon the authority of the Constitution itself, which, by an express grant, has vested all the implied constructive powers in Congress, and in Congress alone. Hear what the Constitution says: Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Comment is unnecessary; the result is inevitable. The Executive, no department, can exercise any power without express grant from the Constitution, or by authority of law. A most noble, wise provision, full of the most important consequences. By it ours is made emphatically a constitutional and legal Government, instead of a Government controlled by the discretion or caprice of those appointed to administer and execute its powers. By it our Government, instead of consisting of three independent, separate, conflicting, hostile departments, has all its power blended harmoniously into one, without the danger of conflict, and without destroying the separate, independent existence of the parts. Let us pause for a moment to contemplate this admirable provision, the simple but efficient contrivance by which these happy results are secured.

It has been often said that this provision of the Constitution was unnecessary; that it grew out of abundant caution to remove the possibility of a doubt as to the existence of implied or constructive powers; and that they would have existed without it, and to the full extent that they now do. They who consider this provision as mere surplusage do great injustice to the wisdom of those who framed the Constitution. I shall not deny that implied or constructive powers would have existed, and to the full extent as they now do, without this provision; but, had it been omitted, a most important question would have been left open to controversy—Where would they reside—in each department? Would each have the right to interpret its own powers, and assume, on its own will and responsibility, all the powers necessary to carry into effect those granted to it by the Constitution? What would have been the consequence? Who can doubt that a state of perpetual, dangerous conflict between the departments would be the necessary, inevitable result, and that the strongest would ultimately absorb all the powers of the other departments? Need I designate which is that strongest? Need I prove that the Executive, as the armed interpreter, vested with the patronage of the Government, would ultimately become the sole expounder of the Constitution? It was to avoid this dangerous conflict between the departments, and to provide most effectually against the abuses of discretionary or implied powers, that this provision has vested all the implied powers in Congress.

Instead of a question of right, he makes it a question of duty, and thus inverts the order of things, referring his rights to his duties, instead of his duties to his rights, forgetting that rights always precede duties, the duties

being, in fact, what the rights impose, and, of course, that duties do not confer power, but impose obedience—obedience, in his case, to the Constitution and laws in the discharge of his official duties. The opposite view, that on which he acts, would give to the President the right to assume whatever duty he might choose, and then convert such duties into powers. This, if admitted, would render him as absolute as the Autocrat of Russia.

B

EXTRACTS FROM WEBSTER'S SPEECH ON JACKSON'S PROTEST.

" The first object of a free people is the preservation of their liberty; and liberty is only to be maintained by constitutional restraints and just divisions of political power. Nothing is more deceptive or more dangerous than the pretense of a desire to simplify Government. The simplest Governments are despotisms; the next simplest limited monarchies; but all republics, all Governments of law, must impose numerous restraints and limitations of authority. They must be subject to rule and regulation. This is the very essence of free political institutions. The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit. It is a cautious, sagacious, far-seeing intelligence. It is jealous of encroachment, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it entrenches itself behind defences, and fortifies with all possible care against the assaults of ambition and passion. It does not trust the amiable weaknesses of human nature; and, therefore, *will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic intent come along with it.* It seeks for duration and permanence. It looks back and before; and, building on the experience of ages which are past, it labors diligently for the benefit of ages that are to come. *This is the nature of constitutional liberty; THIS IS OUR LIBERTY.* A separation of departments, and the preservation of the lines of division between them, is the fundamental idea in the creation of all our Constitutions; and, doubtless, the continuance of regulated liberty depends on the maintenance of these boundaries.

There is a strong disposition running through the whole protest to represent the Executive as the peculiar protector of public liberty—the chief security on which the people are to rely against the encroachments of other branches of the Government. To this end the protest spreads and dwells upon the President's official oath. Would the writer of the protest argue that the oath itself is any grant of power; or that because the President is to preserve, protect, and defend the Constitution, he is, therefore, to use what means he pleases, or any means for such preservation, protection, and defense, except those which the Constitution and laws have specially given him? Such an argument would be preposterous; but if the oath be not cited for this preposterous purpose, with what design is it thus displayed unless it be to support the idea that the maintenance of the Constitution and the preservation of the public liberties are especially confided to the safe discretion, the true moderation, the paternal guardianship of Executive power?

The proposition is that the duty of defending the Constitution against the representatives of the States and the representatives of the people results to him from the nature of his office, and that the founders of our Republic have given to this duty peculiar solemnity and force.

Mr. President, *the contest for ages has been to rescue liberty from the grasp of Executive power.* Whoever has engaged in her sacred cause, from the days of the downfall of those great aristocracies which stood between king and people to the time of our own independence, has struggled for the accomplishment of that single object. On the long list of the champions of human freedom there is not one name dimmed by the reproach of advocating the extension of Executive authority. On the contrary, the uniform and steady purpose of all such champions has been to limit and restrain it. To this end

all that could be gained from the imprudence, snatched from the weakness, or wrung from the necessities of crowned heads has been carefully gathered up, scoured, and hoarded as the rich treasures, the very jewels of liberty. To this end popular and representative right has kept up its warfare against prerogative with various success; sometimes writing the history of a whole age with blood—sometimes witnessing the martyrdom of Sydneys and Russells—often baffled and repulsed, but still gaining, on the whole, and holding what it gained with a grasp that nothing but its own extinction could compel it to relinquish.

Through all this history of the contest for liberty, Executive power has been regarded as a lion that must be caged. So far from being the object of enlightened popular trust—so far from being considered the natural protection of popular right—it has been dreaded as the great object of danger.

Who is he so ignorant of the history of liberty at home and abroad—who is he from whose bosom all infusion of American spirit has been so entirely evaporated—as to put into the mouth of the President the doctrine that the defense of liberty naturally results to Executive power, and is its peculiar duty? Who is he that is generous and confiding towards power where it is most dangerous, and jealous only of those who can restrain it? Who is he that, reversing the order of State and upheaving the base, would poise the pyramid of the political system upon its apex? Who is he that declares to us, through the President's lips, that the security for freedom rests in Executive authority? Who is he that belies the blood and libels the fame of his ancestry by declaring that they, with solemnity of form and force of manner, have invoked the Executive power to come to the protection of liberty? Who is he that thus charges them with the insanity or recklessness of thus putting the lamb beneath the lion's paw? No, sir—no, sir. *Our security is in our watchfulness of Executive power.* It was the constitution of this department which was infinitely the most difficult part in the great work of creating our Government. To give the Executive such power as should make it useful, and yet not dangerous—efficient, independent, strong, and yet prevent it from sweeping away everything by its military and civil power, by the influence of patronage and favor—this, indeed, was difficult. They who had the work to do saw this difficulty, and we see it. If we would maintain our system, we shall act wisely by preserving every restraint, every guard the Constitution has provided. When we and those who come after have done all that we can do, and all that they can do, it will be well for us and for them if the Executive, by the power of patronage and party, shall not prove an overmatch for all other branches of the Government.

I will not acquiesce in the reversal of all just ideas of Government. I will not degrade the character of popular representation. I will not blindly confide where all experience admonishes to be jealous. *I will not trust Executive power, vested in a single magistrate, to keep the vigils of liberty.*

Encroachment must be resisted at every step. Whether the consequences be prejudicial or not, if there be an illegal exercise of power it must be resisted in the proper manner. We are not to wait till great mischief come—till the Government is overthrown, or liberty itself put in extreme jeopardy. We should not be worthy sons of our fathers were we so to regard questions affecting freedom. They accomplished the Revolution on a strict question of principle. They took up arms against the preamble of an act. They saw in the claim of the British Parliament a seminal principle of mischief, the germ of unjust power, which they struck at till they destroyed it. On this question of principle, while actual suffering was yet afar off, they raised their flag against a power to which Rome in her glory is not to be compared—a power which has dotted the surface of the whole earth with her military posts, whose morning drum-beat, following the sun and keeping company with the hours, circles the earth daily with one continuous, unbroken strain of the martial airs of England.

C.

In 1813, a citizen being held in custody by Major-General Lewis, commanding a division of the United States army, on a charge of treason, a writ of *habeas corpus* was issued by the Supreme Court of New York, to which General Lewis, having made an evasive return, an attachment was awarded against him, accompanied by the following opinion of the whole Court, delivered by Kent, Chief Justice. (See 10, Johnson, 333.)

"This is a case which concerns the personal liberty of the citizen. Stacy is now suffering the rigor of confinement, in close custody. He is a natural born citizen, residing in this State. The pretended charge of treason, without being founded on oath, and without any specification of the matters of which it might consist, and without any color of authority in any military tribunal to try a citizen for that crime, is only aggravation of the oppression of the confinement. It is the indispensable duty of this Court, and one to which every inferior consideration must be sacrificed, to act a faithful guardian of the liberty of the citizens, and to give ready and effectual aid to the means provided by law for its security. One of the most valuable of those means is this writ of *habeas corpus*, which has been justly deemed the glory of the English law; and the Parliament of England, as well as its Courts of Justice, have, on several occasions, and for centuries, shown the utmost solicitude, not only that the writ, when called for, should be issued without delay, but that it should be punctually obeyed. Nor can we hesitate in enforcing a due return to the writ when we recollect that, in this country, *the law knows no superior*; and that, in England, her courts have taught us, by a series of instructions and examples, to exact the strictest obedience to whatever extent the persons to whom the writ is directed may be clothed with power, or exalted in rank.

"If ever a case called for the most prompt interposition of the Court to enforce obedience to its process, this is one. A military commander is here assuming criminal jurisdiction over a private citizen, is holding him in close confinement and contemning the *civil authority* of the State."

D.

SYNOPSIS OF CASES REFERRED TO BY ATTORNEY-GENERAL.

The first cited is the Rhode Island case 7, Howard, involving the validity of a statute declaring martial law over that State, which had been sustained by its highest court. The points decided by the Supreme Court are—

First. That according to uniform precedent usage, the Court must conform to the decision of the State Court, this being a matter of purely local State law.

Second. That whenever it may become necessary for the Federal Government to determine which of two conflicting governments in a State is the rightful one, it is for Congress and the Executive, who represent the political power, and not for the Judiciary to decide.

When these points were decided the whole case was disposed of; and all else in the loose opinion delivered was extra-judicial, and the *obiter dicta* of the judge delivering the opinion.

In reply to a question, having no pertinency to the case in hand, that a government by martial law is not such a Republican government as is granted by the Federal Constitution, the opinion wanders off into loose talk about that. Whilst conceding that permanent martial law would not be a Republican government, yet, it says, the legislature of a State, having the right to use its whole military power in suppressing rebellion, and, treating martial law as part of that power, says it may be temporarily used for that purpose. But this must be taken in connection with the fact stated by the Court, that the people of Rhode Island were then still living under their old Colonial charter

as their form of government—they being, consequently, without the protection of a written constitution or bill of rights, the Federal Constitution having no bearing on their case. Not a word is said going to show that the President, or Congress, or any other State legislature, having a bill of rights, could establish martial law; nor is there the slightest intimation that the President can suspend the privilege of the writ of *habeas corpus*.

It is evident, also, that in speaking of martial law, the writer of the opinion had in contemplation a very different sort of power from what has heretofore been uniformly understood by law, and political writers, and in common parlance, as to the meaning of the phrase "martial law." He seems to treat it as a sort of mere adjunct to ministerial power in the enforcement of existing law, and by no means as the introducing of a new for the suspending of the old law.

Justice to Chief Justice Taney requires that these extra-judicial *sayings* of his, in this case, should be taken in connection with his recent *decision* in the *Merriman* case, the latter, by all comity of the profession, being entitled to be treated as the more deliberate, and therefore the better expression of his opinion. This latter opinion is so clear, orthodox, and unanswerable in the expression of his views as to fundamental principles of the Constitution in direct, plain, indisputable conflict with the exercise of any such power by Congress, or the President, for establishing martial law, that it must, with every fair, intelligent mind, exempt him from the dishonoring imputation of having meant, by the former opinion, to have made any such concession. At any rate, the candid will all agree, that the latter strips the former of all pretension as a judicial authority for the purpose claimed. Besides, the former opinion expressly says that the Petition of Right abolished martial law in England, except as to the omnipotent power of Parliament, consequently the equivalent expressions in our bill of rights must have abolished it in this country also, without any exception of Congress or President, there being no omnipotent power here.

The next case cited by the Attorney-General is *Flemming vs. Howard*—9, Howard, 603—which merely decides, that though Tampico was occupied by United States forces during the Mexican war, it was still a foreign port, and duties could properly be levied on goods imported from that place.

The next case cited is *Cross vs. Harrison*—16, Howard, 164. It only decides that tonnage on foreign vessels, and duties on foreign goods, imported into San Francisco, were lawfully collected by the temporary government whilst the war with Mexico continued; and afterwards, until the revenue system of the United States was put into operation there by Congress; also, that the formation of a temporary government in California, by our General, was the legitimate exercise of a belligerent right over a conquered territory of the foreign enemy.

The next case is the *Santisimo Trinidad*—7, Wheaton, 305. The principal points decided here were, that the commission of a public ship of a foreign State, signed by the proper authorities, is conclusive evidence of her national character; and that during the existence of civil war between Spain and her colonies, and previous to our acknowledgment of their independence, the colonies were deemed by us belligerent nations, entitled, so far as concerned us, to all sovereign rights of war against their enemy. There were various other points disposed of, but none having any nearer analogy than these, to the President's power over the writ of *habeas corpus*.

The only other case cited is *Martin vs. Wheaton*—12, Wheaton, 29. The only matter decided in this case, having the slightest bearing upon the claimed power of the President over the writ of *habeas corpus*, is this: That the authority to decide whether there is a danger of invasion to justify a call of militia to repel it, under the act of Congress, is exclusively vested in the President, and his decision thereon is conclusive. This is plain, good authority to prove, what needed no proof, his like authority to determine the question of an existing rebellion, under the same act, authorizing a similar call

for its suppression; but it does not tend at all to prove his power to suspend the writ of *habeas corpus* as an aid in suppressing the rebellion.

These are the cases, all the authorities relied on, for justifying so extraordinary, so unprecedented a usurpation of power. They, none of them, nor all of them together, give it the slightest sanction. The pretense, that they do, falls within the category of the broadly ludicrous. There never was used, on any important occasion, the parade of "such a beggarly account of empty boxes to make up a show," and gull ignorant credulity.

E.

SECTIONS OF THE BILL BEFORE THE SENATE, NOT PASSED FOR WANT OF TIME.

"Sec. 2. After publication of said proclamation (of rebellion) the said commander shall make and publish such *police rules and regulations*, conforming as nearly as may be to previously existing laws, as *he may deem necessary to suppress said rebellion*, restore order, and to protect the lives and property of all the *loyal citizens* within said district; and all the *civil authorities* within said district shall be bound to carry said rules and regulations into effect.

"Sec. 3. If, from any cause whatever, the said civil authorities fail to execute said rules and regulations, the said military commander shall cause them to be executed and enforced by the military force under his command."

Here it is distinctly attempted to give power to a military commander to legislate at will, or make laws for a whole State, and which even the civil authorities are enjoined to obey—stringent laws, too, such as are necessary to suppress rebellion. The simulated restriction of "as near as may be to previously existing laws" is no restriction at all, nor was it meant to be. As near as may be, would be the identical same laws, which would not do; for new laws are intended, and, whatever may be the meaning of police regulations for a whole State, if they be of State creation, they are necessarily limited, and under judicial control, whereas the intent of the bill is to place the commander's stringent rules and regulations above that control. Besides, they are such "as he may deem necessary to suppress rebellion," &c., and if those pre-existing are not adequate or proper, he, of course, is to make others to suit himself. So that they are such "as he deems necessary," that is all which is requisite to their validity. This is a delegation or substitution of legislative power with a vengeance. The attempt is even without a mask—it is impudently made, without an effort at disguise. Here, it is also noticeable, is a distinct recognition of a *civil authority* in the land, of which the President and his military subordinates form no part, notwithstanding the theory of Messrs. Lincoln and Bates.

"Sec. 4. From and after the publication of the proclamation, the operation of the writ of *habeas corpus* shall be so far suspended that no military officer shall be compelled to return the body of any person or persons detained by him by military authority; but, upon the certificate, under oath, by the officer having charge of any one so detained, that such person is detained by him as a prisoner under military authority, further proceedings under the writ shall be dismissed by the judge, or court, having issued said writ."

This section is a sad specimen of senatorial professional ability, supposing, in charity to the Senate, that it did not intend to make every petty officer a sort of sub-dictator in his sphere. Every captain, lieutenant, sergeant, and corporal is not only an officer, but also "a military authority," and any of them having a citizen in custody, under his own causeless, unauthorized arrest, may truthfully return that the prisoner is held by military authority. The court must take his say-so in the matter, dismiss the writ, and is not permitted to inquire whether, in fact, the detention is by real military authority that is in conformity with those same rules and regulations, or upon the mere authority of Mister Corporal. Indeed, the section allows the rules and regulations to go even to that extent, and permit an imprisonment by a corporal,

upon his own discretion, without any limit to the duration of the imprisonment or the discretion. This is splendid legislation for Senators of a free people. They must be possessed with something worse than what Mr. Dana designates as "pusillanimity."

"Sec. 5. All persons, who, after the publication of said proclamation, shall be found in arms against the United States, or *otherwise aiding or abetting* their enemies or *opposers*, within any district to which it relates, and shall be taken by the forces of the United States, shall be either detained as prisoners for trial on the charge of treason or sedition, or *other crimes or offenses*, which they may have committed whilst resisting the authority of the United States, or may, *according to the circumstances of the case*, be at once placed before a court martial to be *dealt with* according to the *rules of war* in respect to unorganized and *lawless armed bands* not recognized as regular troops, or may be discharged on parole not to serve against the United States, nor to aid or abet their enemies or opposers."

What an enemy is we all know; the books have taught us that; but who knows what is an "opposer?" Does it mean one acting in political opposition to the ruling power in the government—the Republican party? It may well mean that, and full as appropriately as anything else. Does not the very introduction of such a new word, in connection with the crime of treason, sufficiently indicate some sinister purpose? Why should such an unusual, undefined, undefinable word be used, but in the hope that the military satraps would give to it the very construction indicated? In the estimation of the getters-up of this bill, there is probably not many things better deserving punishment than opposition to their party rule. In debate they glorified their magnanimity for permitting freedom of debate in the Senate, and allowing Senators to censure their proceedings. What a contrast to the English House of Lords and House of Commons, permitting, without any such self-glorification, Chatham, Fox, Burke, and others, freely to denounce the war against our rebellious fathers, and openly pray for the defeat of the British armies.

"Resisting the authority of the United States." What does that mean? If a citizen should say of this bill, after it has passed, that it is unconstitutional, would that be resisting?—would that be "sedition?"

"Unorganized, lawless armed bands." What does that mean? where shall we find the signification of those phrases? Are not all armed rebels "lawless bands?" So they have always been understood to be. If they are not meant, then what is meant by "lawless bands." Here, again, the selection of loose phraseology enhances the suspicion of a sinister purpose.

"Dealt with" is well enough in common parlance or ordinary composition, and, in the connection here used, would have a well understood and most terrible significance, but is wholly inappropriate in a legal enactment ordering capital punishment. It is usual and decent for such laws to say whether it shall be by strangulation, beheading, or shooting, and not leave that delicate matter to Jack Ketch, even though he may wear an epaulet, or even two epaulets.

"Sec. 6. No sentence of death pronounced by a court martial upon any person taken in arms as aforesaid, shall be executed before it has been submitted to the commander of the military department within which the conviction has taken place, or to the Commanding General of the Army of the United States, who shall either approve the judgment of the court martial, commute the sentence, or may discharge or pardon the person so sentenced."

The whole pardoning power is conferred by the Constitution upon the President, and it would seem that no capital punishment should ever be inflicted without his having a reasonable opportunity to interpose with the nation's mercy. So the matter has always been treated by our courts. It is a power which the President himself can neither abdicate or depute; yet these blunderers are trying to take it away, and give it to our Generals. If they exercise it according to the usage of other satraps, it will prove to them a most lucrative power.

This bill takes no sort of care as to the composition of the courts martial. It would seem but reasonable that a citizen, when tried for his life, should have the privilege of a court composed of officers from his own State, if to be conveniently had, that the trial should be had in the district where the offense was committed, that it should be public, and that he should have compulsory process for his witnesses. But, above all, an American citizen should have the privilege of being tried by his countrymen, and not by foreigners. None of these essentials are attended to. A citizen can be ordered to death by a court composed entirely of foreigners. Indeed, they are the description of officers most apt to be selected by a vindictive, tyrannical commander, for they have already shown their alacrity in *dealing* with *opposers* of the government in a manner entirely to suit the taste of such a commander, and the probable taste of the contrivers of this infamous bill of infamies.

It would be some consolation to the bereaved family and sorrowing friends of a victim of martial law, to know that he had some show of fair trial before a court of his countrymen, instead of a packed court of Germans. It would also be right, when the accused is a foreigner, that he should have the privilege of a court *de midiatate lingue*.